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THE

MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,

OF THE COLORADO BAR.

VOL. XI.

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MINING REPORTS.

VOL. XI.

PETERSON v. WHITEBREAST COAL AND MINING CO.

(50 Iowa, 673. Supreme Court, 1879.)

Co-employe—Superior and inferior servant. A corporation is not liable for injuries suffered by an employe through the negligence of a co-employe of a different grade, not vested with authority in the general management of the corporate business, notwithstanding such co-employe is higher in authority than the one receiving the injury.

Action for damages by employe against employer for negligence; the opinion states the facts; the defendant had judgment below upon demurrer to the petition. Plaintiff appeals.

J. N. MCCLANAHAN, for appellant.

STUART BROS. & BARTHOLOMEW, for appellee.

SEEVERS, J.

It is conceded there is no statute making the defendant liable, but the claim is that a recovery can be had at common law. Nearly twenty years ago it was held in *Sullivan* v. *M. & M. R. R. Co.*, 11 Iowa, 421, that the principal was not liable for damages sustained by an employe from the negligence of a co-employe in the same general service. This rule, as to railway corporations, has been changed by statute.

[1] *Quincy M. Co.* v. *Kitts*, 42 Mich. 34; miner and laborer co-employes: *Troughear* v. *Lower Vein Co.*, 62 Iowa, 576; *Kielley* v. *Belcher Co.*, 10 M. R. 11.

It is insisted, however, that the case above cited is not conclusive as an authority in this, because Watson was boss or foreman having charge and control of the plaintiff and another employe.

It is apparent, however, that Watson was simply an employe engaged in the same general service as the plaintiff. It is true he had, to a limited extent, a control of other employes. It does not appear what was the extent of his authority, except such as can be inferred from the terms used in defining it. Certain it is that it is not averred he had authority to discharge other employes, or that the defendant was negligent in employing him.

We have, then, for determination, the question whether the defendant is liable for the negligence of a co-employe of a different grade, but who is vested with no authority in the general management of the corporation. It makes no difference if the employe receiving the injury is inferior in grade to the one by whose negligence the injury was caused: Shearm. & Redf. on Neg. § 100. In support of this doctrine many authorities are cited. The same rule is stated in Law of Negligence, by Wharton, § 229, where, however, it is said the rule is otherwise when the employer leaves everything in the hands of an employe, reserving no discretion to himself.

There is no averment in the petition which brings this case within the exception, and no such presumption can be indulged. We are satisfied that the decided weight of authority is in favor of the ruling below.

It is insisted that *Harper* v. *Ind. & St. L. R.*, 47 Mo. 567 (4 Am. Rep. 353); *Lalor* v. *C., B. & Q. R. Co.*, 52 Ill. 401; (4 Am. Rep. 616); *Flike* v. *Boston & Albany R. Co.*, 53 N. Y. 549 (13 Am. Rep. 545); and *Malone* v. *Hathaway*, 64 N. Y. 5 (21 Am. Rep. 573), sustain the position of appellant. Even if this were so, and we were to follow such decisions, the effect would be to overrule *Sullivan* v. *M. & M. R. R.* before cited, and this, in view of the legislation on this subject, we should feel unwilling to do. But counsel are mistaken as to the rule established in the foregoing decisions. The facts in the two last cases show them to be fairly within the exception above stated. In the other two cases the corporation was

held liable, but upon an entirely different principle; Counsel also cite *Kellog* v. *Payne*, 21 Iowa, 575, and *Callahan* v. *B. & M. R. R.*, 23 Id. 563. Neither of these cases are applicable to the case in hand.

Affirmed.

WRIGHT v. RAWSON.

(52 Iowa, 329. Supreme Court, 1879.)

[1] **Miner killed while off duty.** An employe in a coal mine left the room where he was at work, and went to another, according to custom, to visit some other employes there at work, and while there the roof fell in, by reason of the decay and insufficiency of the supports, and killed him. *Held*, that not being engaged in the line of his duty at the time of the injury he stood in the same relation as a visitor to the mine and could not complain of defendant's negligence.

Action for negligence causing the death of plaintiff's intestate; the defendant had judgment below on demurrer.

B. A. WILLIAMS and SMITH & BAYLIES, for appellant.

BARCROFT, GIVEN & MCCAUGHAN, for appellee.

BECK, C. J.

The petition alleges that defendant is the owner of a coal mine, and is engaged in mining coal therein, and that plaintiff's intestate was employed as a miner by defendant. The petition then proceeds to set out the cause of action in the following words:

"That defendant and his superintendent knew that it was the custom of miners in said mine and had been the custom from the time said mine was opened, when not actively engaged in work, to visit each other in their respective rooms.

"That with full knowledge of such custom defendant acquiesced in it, and thereby invited and permitted them so to do.

[1] See *Higham* v. *Wright*, 10 M. R. 24; *Brydon* v. *Stewart*, 2 Macq. Sc. App. 30.

"That prior to said 15th of October, 1877, there was a room in said mine that had been at one time used by defendant for mining coal, but said room had been unused for about six months prior to said 15th of October, 1877, and during the time of such non-use the supports to the roof of said room had become decayed and weakened, and the rock, slate and dirt composing the roof had become weakened and loosened, so that the same was defective and dangerous, and was well known to be defective and dangerous by defendant and his superintendent, on said 15th of October, 1877.

"That the defective and dangerous condition of said room was entirely unknown to said Samuel Wright.

"That on said 15th of October, and while said room and roof were in the dangerous and unsafe condition aforesaid, the defendant, by his superintendent, carelessly and negligently caused two of defendant's employes to go to work in said room digging coal, and thereby caused said Samuel Wright and other employes to believe that the said room, and the roof thereof, were safe and not dangerous to be used and occupied, and thereby invited and permitted the said Wright and other employes in said mine to go into said room, where two of defendant's employes were at work, as aforesaid, in accordance with their usual and known custom, and without warning the said Wright, in any manner, that the said room was dangerous to be occupied or entered.

"That on said 15th of October said Samuel Wright was at work for said defendant as a miner, in a room in said mine near to the said defective and dangerous room, when, about 11 o'clock of said day, and being at leisure for a few minutes and knowing that miners were at work in said room, and not knowing its dangerous condition, and acting upon the aforesaid custom and the acquiescence of defendant as aforesaid therein, and relying upon defendant to keep said premises in a safe condition for use, entry and occupancy, as it was his duty to do, he, the said Wright, stepped out of the room where he was at work and into said dangerous room for the purpose of speaking to the men therein employed, and immediately after he had entered said room, owing to the dangerous and defective condition of the roof thereof and the decayed and insufficient supports for the same, as aforesaid, four tons of rock,

slate and dirt, composing the roof of said room, fell upon the said Samuel Wright, whereby he was instantly killed.

"That the death of said Wright, as aforesaid, was directly caused by the carelessness and negligence of defendant in permitting said roof to become loosened and weak, the props and supports thereof to become decayed and unsafe, and in causing his servants to occupy and use such room in such dangerous and unsafe condition, and in permitting, and by his conduct and acquiescence inviting, the deceased and others employed in said mine to use, occupy and enter said room, without adopting any rules to prevent them from being exposed to said danger, of which defendant had knowledge, and without warning them or said deceased of such danger."

The demurrer assails the petition on the grounds, among others, that "it shows the deceased was not, at the time of injury, in the line of his duty, in the service or employment of defendant," and "it does not show that defendant was charged with any care or diligence to protect persons visiting said room from danger of injury by the falling of the roof of said room."

In order to establish liability of defendant it must be made to appear that the intestate was in defendant's employment and in the proper discharge of duty, and that he did not voluntarily seek a place of danger. It can not be claimed that defendant would be liable if intestate had been a visitor to the mines, or had left his proper place and sought the dangerous room without thereby serving defendant or discharging any duty of his employment. When the accident happened it clearly appears that the intestate was not engaged in mining, which was his employment; that his proper place was not in the room where he was injured, but on the contrary, he was a visitor there for his own pleasure or amusement. The intestate not being engaged in his employment was in the same position of a visitor to the mine. As an employe, having voluntarily put himself in danger, he can not recover: *Doggett* v. *Ill. Cent. R. R.*, 34 Iowa, 284.

The custom of miners to visit their fellow workmen, and the acquiescence of the defendant in such custom, can not be regarded as an invitation for the workmen to leave their proper places and frequent dangerous parts of the mine at the risk of defendant.

The allegations of the petition do not present the case of a trap or concealed danger of which the defendant was bound to give notice. It is not shown that the dangers were not apparent, or could not have been seen by the intestate. There is necessarily some degree of danger in all mines, and such dangers are increased by the age of the supports of the roof and other causes. It is not shown that these dangers were concealed by defendant and the intestate was induced or invited by defendant to expose himself thereto.

We conclude that the g ounds of the demurrer which we have discussed were well taken, and the court correctly held the petition defective. The other objections raised by the demurrer need not be discussed.

Judgment affirmed.

HONOR v. ALBRIGHTON.

(93 Pennsylvania State, 475. Supreme Court, 1880.)

Statute construed—Fellow servant's contributory negligence. A lad about thirteen years old was employed as a slate picker in a coal breaker. Another lad who was attending the machinery called to him to bring him the oil can; he left his post, and in taking the can fell into a pair of rollers breaking coal where he was severely injured. It appeared that the rollers were covered with a box upon the top of which was an opening covered by a plank, which was displaced at the time of the accident, and was so often before with the knowledge of the injured boy; *Held*, that the provision in the act of March 3, 1870, that all machinery where boys work shall be properly "fenced off" was intended to mean properly protected, and that in providing this cover for the rollers the employer did his whole duty under the act *Held, further*, that if the cover was unnecessarily removed without the fault or knowledge of the employer, through the negligence of one of the employes, there could be no recovery according to well settled principles. *Held, further*, that the conduct of the boy presented a case of contributory negligence.

Error to the Common Pleas of Luzerne.

Case, by John Honor against John Albrighton and others, doing business as Albrighton, Roberts & Co., to recover damages for injuries to the minor son of the plaintiff, alleged to have been caused by the negligence of defendants.

It appeared at the trial that Edward Honor, the minor son of the plaintiff, was in 1871 employed at the defendant's coal breaker at Plymouth, Luzerne county, as a slate picker. In breaking coal it is passed through rollers and broken into the various sizes required for use, and after being broken it is shot down chutes to storing places, whence it is loaded into the cars. Boys stand by the sides of the chutes, and, as the coal passes by, pick out the slate therefrom. This was the daily employment of young Honor, and while thus engaged, on the 15th of September, 1871, at the lower portion of the breaker, there was just above him a pair of rollers called the "monkey-rollers." His place as a slate picker was about twenty feet below these rollers, and did not in any way expose him to danger from them. The lad, who was about thirteen years old, was engaged at his usual work, when a boy named Hobbs, who was attending the machinery above, called to him loudly to bring him the oil can, which was by the stove near Edward to be kept warm. The latter seized the can and ran up rapidly toward Hobbs, when, just before he reached him, he stepped into the monkey-rollers and his leg was caught and crushed by them.

The opening over the small rolls was six inches wide, and two feet eight and a half inches long; this opening was secured with a plank fitting into the opening, and which could not be removed except by lifting it up. When the plank was down there was entire security against any danger from the rolls. The plank was intended to be removed if the rolls became choked, for the purpose of clearing them out. The plank was displaced at the time of the accident, as it frequently had been before, to the boy's knowledge.

The act of March 3, 1870, Pamph. L. 3, making provision for the health and safety of persons employed about coal mines, enacts in the 13th section that "all machinery in and about the mines, and especially in the coal breakers, where boys work, shall be properly fenced off," and the 24th section provides: "That for any injury to person or property occasioned by any violation of this act, or any willful failure to comply with its provisions, by any owner, lessee or operator of any coal mine or opening, a right of action shall accrue to the party injured for any direct damages he may have sustained thereby, etc."

In the general charge the court, HARDING, P. J., *inter alia*, said:

"But conceding that the statute amounts to more than a reiteration of the common law, with reference to the right of an employe who has been injured about one of these collieries, and who brings an action to recover compensation, still, in my judgment, it does not absolve him from the same rule of conduct in connection with the subject-matter of the injury that applied before. Contributory negligence on his part would be as fatal to the success of his action to-day as it would have been before the statute had existence.

"Assuming the colliery in question to have been dangerous; assuming, further, that these defendants were guilty of negligence in not having complied with all the provisons of the act to which reference has been made, still [if the boy, Edward Honor, knew, as he says he did, of the condition of these rollers, and of the danger in approaching them, but nevertheless, at the call of his co-employe, hastened to deliver the oil can, an errand wholly outside of his own duty, and injury befell him, as has been described, his father can not recover in the present action. The conduct of the boy can not be regarded as less than negligent.] [We have then only to say to you that the plaintiff is not entitled to recover, and that your verdict must be for the defendants.]

The verdict was for defendants, and after judgment thereon, plaintiff took this writ, alleging that the court erred in the portions of the above charge included in brackets.

A. RICKETTS, JOHN LYNCH, C. R. BUCKALEW and W. J. BUCKALEW, for plaintiff in error.

C. L. LAMBERTON and ANDREW T. MCCLINTOCK, for defendants in error.

PER CURIAM.

The act of March 3, 1870, ought to have a liberal but reasonable construction. In providing that the machinery in and about the mines and coal breakers "shall be properly fenced off," it evidently intended merely proper protection. Then, to protect the opening into which the plaintiff fell, a

fence, in its literal sense, would not have been as efficient protection as the board used to cover the opening. In providing this cover the employer did his whole duty under the act. If that cover was unnecessarily removed without his fault or knowledge, through the negligence of one of the employes, no other servant could recover according to well settled principles. The conduct of the boy presented a case of contributory negligence. It was not the intention of the act of assembly to change these just and reasonable rules.

Judgment affirmed.

1. Neglect of railway company to sufficiently drain surface after excavating way over mines: *Bagnall* v. *London, etc. Co.*, 5 M. R. 362, 366.

2. Master's liability to the public for injury done by a servant, and his exemption from liability to one servant for injury done to him by fellow servant: *Bartonshill C. Co.* v. *McGuire*, 3 Macqueen, 300. See also *Bartonshill C. Co.* v. *Reid*, Id. 266.

3. The owner of a dam is bound to so control it as not to injure his neighbors, and the want of caution on the part of the injured person is no defense to an action for such injuries: *Fraler* v. *Sears W. Co.*, 12 M. R. —.

4. The mere fact that the timbers of a dam outwardly present a strong appearance does not necessarily show due diligence in making it safe: *Hoffman* v. *Tuolumne Co.*, 10 Cal. 413.

5. An owner of land is under no legal obligation to fence a quarry on the land, unless it is so near to a public road or way as to constitute a public nuisance: *Hounsell* v. *Smyth*, 7 C. B. N. S. 731.

6. In determining what is proximate cause, the true rule is, that the injury must be the natural—a probable, consequence of the negligence: *Hoag* v. *Lake Shore R. R.*, 85 Pa. St. 293.

7. Knowledge as an ingredient of negligence: *Knaresborough* v. *Belcher Co.*, 12 M. R. —.

8. Fire resulting from tow boat towing leaky oil barge: *The James Jackson*, 9 Fed. 614.

9. Storing gunpowder may amount to a nuisance and render the owner liable, although not guilty of negligence with respect to the act which exploded it: *Myers* v. *Malcolm*, 6 Hill, 292; 41 Am. Dec. 744.

10. Storing of powder in a warehouse held to be the proximate cause of the loss of other goods, which would have been saved by firemen had they not feared an explosion: *White* v. *Colorado Central R. R.*, 5 Dillon, 428.

11. Obligation of mine owner to the owner of the surface to fence shaft, and liability for failure so to do: *Williams* v. *Groucott*, 4 B. & S. 149; *Post* SURFACE.

12. Ignorance no excuse for working across dividing line between mining claims: *Maye* v. *Yappen*, 10 M. R. 101.

13. Under the Nevada Statute, there may be a recovery for death by wrongful act, without setting forth in the complaint that there are kindred;

and it is immaterial whether the death is immediate or consequential: *Roach* v. *Imperial M. Co.*, 7 Fed. 698.

14. Miners had excavated into the side of the road, making a precipitous bank. No guard was put up; in consequence, a wagoner's team was injured. *Held*, negligence of the supervisors, for which the township was liable: *Lower Macungie* v. *Merkhoffer*, 71 Pa. St. 276.

15. Notice to agent of unsafe condition of mine, is notice to principal: *Quincy Coal Co.* v. *Hood*, 12 M. R.—.

16. Plaintiff can not recover if his own want of care contributed to the accident. It must, however, be not only his act, but his fault, which so contributed: *Lopez* v. *Central Arizona Co.*, 2 Pac. 748.

17. Knowledge of danger without making complaint: *Id.*; *Alexander* v. *Tennessee Co.*, 3 Pac. 735.

18. The foreman not a fellow servant: *Beeson* v. *Green Mt. Co.*, 57 Cal. 20.

19. Corporation liable for accidents from contractor's blasting: *Stone* v. *Cheshire R. R.*, 19 N. H. 427; 51 A. D. 192.

20. Responsibility shifted by contract from owners to contractors: *Samuelson* v. *Cleveland Co.*, 43 Am. R. 456; 49 Mich. 164.

21. Estoppel by contract against enjoining nuisance: *Kennerty* v. *Etiwan Phosphate Co.*, 17 S. C. 411; 43 A. R. 607.

22. Lessor not responsible to servant of lessee, even where servant is ignorant of the letting: *Crusselle* v. *Pugh*, 67 Ga. 430; 44 A. R. 724.

23. Foreman remaining after negligence known; failure to employ sufficient hands: *Alexander* v. *Tennessee Co.*, 3 Pac. 735.

24. Injury by blasting where two companies allowed each other to throw rocks on one another's land: *Beauchamp* v. *Saginaw Co.*, 45 A. R. 30; 50 Mich. 163.

25. Transportation of nitro-glycerine: *Foley* v. *Chicago Co.*, 48 Mich. 622.

26. Degree of care required of master: *Buckley* v. *Gould & Curry Co.*, 14 Fed. 833.

27. A party may be held liable for the consequences of failure to keep his ditch bed clear of debris: *Chidester* v. *Cons. Ditch Co.*, 59 Cal. 197.

28. Defendant held liable for taking inexperienced employe into dangerous place without warning: *Parkhurst* v. *Johnson*, 50 Mich. 70.

29. Company chargeable with knowledge of reputation of unfitness of employe, causing the accident: *Davis* v. *Detroit R. R. Co.*, 20 Mich. 105.

30. Experimenting with new explosives: *Smith* v. *Oxford Co.*, 2 M. R. 208; *Spelman* v. *Fisher Co.*, 56 Barb. 151.

31. Accidents from defective ropes: *Baker* v. *Allegheny R. R.*, 95 Pa. St. 211; 40 Am. R. 634; *Perry* v. *Ricketts*, 9 M. R. 687. From decay of timbers: *Quincy Co.* v. *Kitts*, 42 Mich. 34.

FAIR v. STEVENOT ET AL.

(29 California, 486. Supreme Court, 1866.)

[1] **Notice by possession under unrecorded deed.** Possession of real estate by the grantee in a prior unrecorded deed is not of itself conclusive notice of the grantee's title to a subsequent purchaser whose deed is first recorded, but such possession is evidence tending to prove notice.

Idem—Diligent inquiry by purchaser. If the grantee in a prior unrecorded deed relies alone on the fact of possession of the property sold to show notice to a subsequent purchaser whose deed is first recorded, the subsequent purchaser may show in rebuttal that he used due diligence in making inquiry, and failed to obtain a knowledge of the prior unrecorded deed.

[2] **Prior deed not conclusive of title.** A deed which has been recorded is not conclusive evidence of title in the grantee, as against a grantee in a prior unrecorded deed who is in possession.

Consolidation of causes in Supreme Court. If the plaintiff and defendant each appeal from different portions of the same judgment, and the parties do not stipulate that either transcript may be added to the other, each appeal must be heard on its own transcript.

Appeal from the District Court, Eleventh Judicial District, Calaveras County.

The court gave judgment in favor of plaintiff for six sevenths, and in favor of defendants for one seventh of the quartz ledge, the property sued for.

The other facts are stated in the opinion of the court.

J. P. BARBER, for appellant.

SLOAN & PROVINES, for respondents.

By the Court, RHODES, J.

The plaintiff appealed from that portion of the judgment which was entered in favor of the defendant for one seventh of the premises sued for. This appeal and the appeal designated as No. 369 are taken from different portions of the same judgment. The first appeal was heard upon the judg-

[1] *Kinney* v. *Con. Va. Co.*, 10 M. R. 457; *Abbott* v. *Gregory*, 39 Mich. 68.
[2] *Davis* v. *Blunt*, 6 Mass. 487; 4 Am. Dec. 168.

ment roll alone, and this cause is presented on a statement on appeal filed by the plaintiff, to which is attached a stipulation, by which it is agreed, among other things, that the cause "may be argued on the foregoing statement." The causes have not been consolidated in this court, and the parties have not stipulated that either transcript may be added to the other; and this cause must be heard on the transcript filed herein, without the aid of that filed on the appeal taken by the defendants.

The rehearing was granted in this cause mainly that a reargument might be had upon the question of notice to the defendants, of certain unrecorded deeds under which the plaintiff claims, made prior to the deed under which the defendants claim.

It appears from the statement that the deeds to Morgan, under whom the plaintiff claims, all of which were executed prior to the year 1858, were recorded on the 17th day of October, 1860; and that the constable's deed, under which the defendants claim, was executed July 7, 1859, and was recorded on the 22d day of September following; and that the constable's sale, in pursuance of which the deed was executed, took place on the 28th of December, 1858. The statement does not contain a finding of the facts, nor the evidence, except certain portions of that introduced by the defendants, to which objections were taken by the plaintiff, but certain facts are stated as facts in the case. It is stated as a fact that "Morgan was an owner and in possession of his interests in the mine, superintending and working the same through himself or his agents from the year 1851 to the time of the eviction by the defendants or their grantors in 1859." The only interest in the mine that is stated in the transcript to have vested in Morgan was the interest of Rowe, which was the undivided one seventh of the mine. It further appears that in the progress of the trial "the court decided that as the various deeds of Rowe's interest vesting the same in Morgan were not recorded until after the constable's deed to the execution creditors, who became purchasers under such execution for the amount of their judgment, said execution creditors and purchasers were subsequent *bona fide* purchasers for a valuable consideration without notice; that their deed,

being first recorded, had priority over Morgan's subsequently recorded deed, and entitled them to Rowe's interest of the one seventh so purchased by them at the constable's sale; to which decision plaintiff then and there excepted."

Possession under an unrecorded deed evidence tending to prove notice.

The plaintiff's position is that the possession of Morgan, in the manner set forth in the statement, was notice of his unrecorded deeds, and the defendants contend that it was merely evidence tending to prove such notice.

No case has heretofore been before the court requiring a decision of the precise question now presented. Notice of the existence of the deed is of two kinds, actual or constructive. Neither the cases nor the text writers altogether agree in their classifications of notices. In most cases, all descriptions of notices except positive—those in which the knowledge of the deed is brought directly home to the party—are held to be included among constructive notices; but in others, all notices that are not deduced as conclusive presumptions of law arising from a given state of facts, are considered to fall within the class of actual notices: Sto. Eq. Jur., Sec. 399; *Dey* v. *Dunham*, 2 John. Ch. 182; *Grimstone* v. *Carter*, 3 Paige, 421; *Jackson* v. *Van Valkenburgh*, 8 Cow. 260; *Tuttle* v. *Jackson*, 6 Wend. 213; and see also *Williamson* v. *Brown*, 15 N. Y. 354, in which Mr. Justice Selden ably reviews the authorities on this question.

A recorded deed is an instance of constructive notice, and upon proof being made that it has been duly recorded, the presumption of notice to the subsequent purchaser arises, and the presumption is a conclusive presumption of law, and no opposing evidence is admissible. But whether the notice of the unrecorded deed, implied from the fact of possession of the premises by the grantee, may properly be included within the one or the other of the kinds of notice, it could not be maintained, nor is it in any case said, that upon proof of such possession the opposite party is precluded, as in the case of the recorded deed, from offering any evidence to repel the implication of notice, nor that the implication arises from the single fact of possession, independent of any other fact in the case. If

this be true, the presumption is not a conclusive presumption, and the fact of possession is only evidence tending to prove notice. Neither the recorded deed in the one case, nor the possession of the grantee of the unrecorded deed in the other, is the ultimate fact, but *notice* is the ultimate fact, to be established by the evidence. Upon proof being made of the record of the deed, the notice necessarily results by operation of law; but not so upon proof of possession, for the possession may be taken and held in such various modes, and accompanied by so many qualifying circumstances, that each case must depend upon its own peculiar features; and therefore proof of possession is not of itself decisive without regard to the other facts of the case.

This becomes apparent upon noticing one of the many cases that will readily occur to the mind. The general rule is—except in cases of conclusive presumptions, like the recorded deed, actual notice of the deed to the agent of the subsequent purchaser, the recital in his deed of a former deed, etc.—that whatever puts the party upon inquiry, provided inquiry becomes his duty, is in judgment of law notice to him. Take the case where the holder of the unrecorded deed is personally in the open, notorious, and exclusive possession of the premises, and who, upon inquiry being made as to his title, asserts a claim derived from a hostile source; or the case where the person apparently in possession is subsequently shown to be the servant of the owner, and who refuses to answer any inquiry concerning the title by which he holds; in neither case will notice be implied. And so in every case where possession in any of its various characters is proven, if the facts of the case are not sufficiently certain as to time, place, persons and circumstances, to put the subsequent purchaser upon inquiry, or if, after having pursued the inquiry with proper diligence, he fails to attain the knowledge of the unrecorded deed, notice will not be presumed. Notice, therefore, is the ultimate fact to be proven, and possession is evidence upon that issue; and it may or may not be sufficient, according to the circumstances of the particular case, it being understood, of course, that the open, notorious, and exclusive possession of the prior purchaser is sufficient to put the subsequent purchaser upon inquiry; and from that fact alone notice of the unre-

corded deed should be found, unless he shows that he pursued the inquiry with proper diligence and failed to attain knowledge of the deed. See *Kendall* v. *Lawrence*, 22 Pick. 544; *Bell* v. *Twil.gh'*, 22 N. H. 518; *McMechan* v. *Griffing*, 3 Pick. 155; *Williamson* v. *Brown*, 15 N. Y. 354.

It was held in *Hunter* v. *Watson*, 12 Cal. 376, "that the open, notorious possession of real estate, by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee's title," and it was so decided also in *Stafford* v. *Lick*, 7 Cal. 489. Mr. Chief Justice Field says, in *Lestade* v. *Barth*, 19 Cal. 676: "This possession and occupation were sufficient to put the purchaser upon inquiry as to the interest, legal or equitable, which the defendant held in the premises, and that inquiry should have been made of the defendant thus in the possession and occupation." It is not said, however, that the possession was *per se* notice, and if it could be so held, the inquiry incumbent upon him would be useless, for he would be chargeable with notice, whether the inquiry could or could not result in a discovery of the real facts of the case. In *Dutton* v. *Warschauer*, 21 Cal. 627, some of the language of the chief justice is broad enough to express the idea that possession amounted to notice; but the context itself clearly shows, as does the concurring opinion of Mr. Justice Norton, that it was only intended to be said that the possession of the defendant in the case, open, notorious, and exclusive as it was found to have been, was sufficient to put the subsequent purchaser upon inquiry as to the interest held by the defendant.

In this case, as presented to us, there is the single fact that Morgan was in possession of his interests in the mine, superintending and working the same through himself or his agents; but the evidence on that point is not given, nor does it appear that the court found that the defendants did or did not have notice of Morgan's deeds. If the evidence were all before us, in respect to Morgan's possession, and the inquiry, if any, instituted by the defendant, it would not be proper for us to assume the functions of the district court, and find the facts of the case.

The defendants must prevail, unless they had notice of the unrecorded deeds to Morgan; but it appears from the case, as

presented in the transcript, that the court below wholly disregarded the evidence establishing the fact of Morgan's possession, and gave priority to the constable's deed, through which the defendants claim, solely on the ground that it was first recorded. This was error; for the fact stated in relation to the possession of Morgan tended to prove notice to the purchasers at the constable's sale, and priority should not have been assigned to the constable's deed, because first recorded, irrespective of the question of notice to the purchasers of the existence of Morgan's deeds.

Judgment for the defendants, for the one seventh of the premises sued for, reversed, and the cause remanded for a new trial as to that portion of the premises.

SHEETS ET AL. V. ALLEN ET AL.

(89 Pennsylvania State, 47. Supreme Court, 1879.)

[1] **Possession of lessee—Notice of his interest.** The principles which govern mining leases, that actual possession of the tenant carrying on the mining operations is notice of his interest to a third person as fully as is the tenancy of a dwelling house, and that if the lease is for a term not exceeding three years it is valid, though not in writing, apply to a lease of land with right to quarry minerals or dig clay.

ERROR to the Court of Common Pleas, No. 2, of Philadelphia County.

Trespass *vi et armis* by Sheets & Hinckle against Benjamin Allen and John A. Gerritt for digging and removing clay from the premises of plaintiffs.

At the trial before MITCHELL, J., it appeared that on May 20, 1874, Gerritt, one of the defendants, by deed without reservation, conveyed to John J. Griffith, the land out of which the alleged traspass arose, and that in May, 1875, the plaintiffs, at public sale, without any reservation, purchased the same from Griffith. The property in question, which consisted of a number of lots, was originally bisected by the Buckroad, and running as it did diagonally through the land

[1] *Chamberlain* v. *Collinson*, 9 M. R. 36; *Wilson* v. *Henry*, 1 M. R. 158.

cut it up into irregular parcels. Gerritt, it appeared, owned on one side of the road and Griffith on the other, and when, in 1873, the road was abandoned and the land reverted to the owners, Gerritt, for the purpose of squaring the lines, conveyed to Griffith the lots in dispute, which were in part the land which reverted to Gerritt out of the Buck road. In 1854 Gerritt had leased to Allen a tract of land, including a portion of the tract in question, at a yearly rental of $1,000, with the right to dig clay. Under this lease, which was in writing and under seal, Allen took possession and erected brick kilns, sheds and offices. When the land which had been embraced in the Buck road reverted to Gerritt by the vacation of the road, Allen, under a verbal lease made in 1873 or 1874, proceeded, under the direction of Gerritt, to take the clay therefrom. The clay had already been taken from a portion of the land when the plaintiffs received their deed from Griffith, and Allen was proceeding to remove the rest, under instructions from Gerritt to do so, when the plaintiffs notified the men who were digging the clay that they were working upon plaintiffs' ground. The men paid no attention to the notice, and resumed their digging, when plaintiffs had them arrested. Allen was subsequently served with notice, but pending proceedings in equity for an injunction he removed the clay from the whole plot.

The court, under objection, admitted the following offer of defendants:

"That Allen was a tenant of Gerritt for these premises, prior to conveyance to plaintiffs, for over twenty years; that the fact was well known to Sheets, and that he was in possession of these lots under his lease, with the right to dig clay, before plaintiffs bought from his landlord."

The plaintiffs asked the court to charge as follows:

If Gerritt conveyed the premises in question to Griffith in May, 1874, without reserving any rights, and the latter conveyed to the plaintiffs in 1875, without reservation or notice, the lease relied on would have no force as against the plaintiffs, and the defendants had no authority in January, 1876, to enter upon the land and remove the clay, and the verdict should be for the plaintiffs; which the court refused, because there was no evidence of any notice on the part of the defend-

ants' landlord or his grantees, the plaintiffs, to terminate the lease.

In the general charge the court said:

"If there was a lease for these premises, either verbal or in writing, prior to the conveyance to Griffith, then Allen was entitled to the possession of that property and to take away the clay from it, and no conveyance of his landlord would affect these rights, and they were not subject to any action of his landlord or any other purchaser over his head. When Sheets became owner of this property he acquired then the right which Gerritt previously had to give notice to Allen that he had determined to terminate the lease; but there is no evidence of any such notice having been given, and therefore the plaintiffs proceeded as if there was no lease. If Allen was a tenant before Sheets bought the property, then he was entitled to take the clay."

The jury returning to the court for further instructions as to the effect of a verbal lease, the court then said:

"If there was a verbal lease made in 1873 to cover the lots in question, it was a lease from year to year; and if notice was not given by the plain iffs to the defendants to quit at the end of any year, the lease would be binding as to them, and they can not recover."

The verdict was for defendants, and after a motion for a new trial had been refused, the plaintiffs took this writ and assigned for error the admission of the above evidence, the answer to plaintiffs' point and the foregoing portion of the charge.

J. M. MOYER, for plaintiffs in error.

W. A. MANDERSON, for defendants in error.

TRUNKEY, J., delivered the opinion of the court.

At the outset the plaintiffs assume that Allen's defense was a parol license to enter upon the land and dig clay, without limit as to time or quantity. Upon this their argument is built, fortified by numerous authorities, demonstrating that the learned judge committed a series of blunders. There is no

escape from this conclusion, if it be that Allen claimed an incorporeal hereditament—a mere right to take clay—resting upon an oral promise. Therefore, we pass at once to consider the nature of the defense as set forth in the defendants' offer of testimony, the receiving of which is assigned for error—namely, "that defendant Allen was a tenant of Gerritt, for these premises, prior to conveyance to plaintiffs, for over twenty years; that the fact was well known to Sheets, and that he was in possession of these lots, under his lease, with the right to dig clay before plaintiffs bought from his landlord."

Instead of a mere license, the defendants put forward an actual interest or estate in the land, a leasehold in possession of the tenant, which was known to the plaintiffs when they purchased and took title. In order to constitute a lease of mines it is not necessary that the lessee should have an interest in the surface, for minerals may form a distinct inheritance in the lands of which they are part, and consequently an estate may be created in and restricted to any specified mineral. In the mining districts leases of lands, for purposes of taking ore, coal or petroleum, are common, wherein the tenants are restricted to the use of only so much of the surface as necessary for mining purposes, with right in the lessor to use the surface as he chooses, save that he may not interfere with the rights of the lessee. Frequently the lands are unoccupied for any purpose other than the mining, and frequently they are occupied by the lessor for agricultural or other uses. The actual possession of the tenant, carrying on his mining operations, is notice of his interest to a third person as fully as the tenancy of a dwelling house. And if the lease is for a term not exceeding three years, it is valid, though not in writing. A parol agreement that a person shall enter on the land of another, dig ore, erect buildings, etc., and pay fifty cents a ton for all ore removed, amounts to a lease: *Moore* v. *Miller*, 8 Barr, 272. Like principles apply to a lease of land with right to quarry minerals or dig clay. The right of a tenant in possession, under such a lease, is not extinguished in favor of a purchaser who knew the fact. And when the tenant is taking the clay the notice to third persons of his estate is marked, for the working is upon the surface. It is none the less a lease, if the land is not inclosed or cultivated. The offer was ad-

missible, and if the testimony established the facts as therein alleged the defense was complete. That the evidence thereof was sufficient to submit to the jury is not denied, nor is error assigned to its submission. Indeed, Sheets himself testifies that he knew Allen was Gerritt's tenant, and had his brickyard on the ground; that he dug clay for his bricks, and had taken about eight feet off the west lot at time of purchase, and that there was no division of the property into lots, except on paper. This matter may have been materially qualified, or explained away, by other parts of his testimony in its application to the land he purchased. The whole testimony was for the jury. The learned judge seems to have clearly apprehended the nature of the defense, and his rulings, as set forth in the assignments of error, were entirely sound.

The plaintiffs raised and discussed some points not embraced in the assignments, upon which the court was not requested to charge, and these can not now be considered. If error was committed it must be shown by the record. For aught that appears the court gave correct instructions in reference to the portions of land occupied for a highway, prior to vacation of Buck road in 1873.

Judgment affirmed.

1. Misdescription in location notice: *Johnson* v. *Parks*, 4 M. R. 316.

2. One who purchases before notice but pays *after* notice, not a *bona fide* purchaser: *Palmer* v. *Williams*, 24 Mich. 328; *Post* TRUST. See *Brophy Co.* v. *Brophy Co.*, 15 Nev. 101.

3. A location notice is evidence of possession, but of itself not sufficient: *Thompson* v. *Lee*, 1 M. R. 610.

4. Notice necessary to terminate lease granted for the purpose of exploring land for minerals: *Patton* v. *Axley*, 8 M. R. 472.

5. Notice of the rescission of a contract is not void because given on Sunday: *Pence* v. *Langdon*, 99 U. S. 578; *Post* RESCISSION.

6. Notice to agent of unsafe condition of mine is notice to principal: *Quincy Coal Co.* v. *Hood*, 12 M. R. —. Knowledge of the superintendent is knowledge of the company: *Bowers* v. *U. P. Ry.*, 7 Pac. 251.

7. A location notice posted before the discovery or knowledge of the existence of mineral, initiates no rights: *Erhardt* v. *Boaro*, 113 U. S. 527.

8. Willful ignorance, equivalent to actual notice: *Mackey* v. *Fullerton*, 7 Colo. 557.

See LOCATION CERTIFICATE.

STILES ET AL. v. LAIRD.

(5 California, 120. Supreme Court, 1855.)

[1] **Abatement—Obstructing water in mining gulch.** The obstruction of water in a mining gulch, to the common injury of many miners working their possessory claims below, is a nuisance which such miners might abate in a peaceable manner if they were first in the appropriation of the water for mining uses.

Statute and common law not in conflict. The statute of California defining what are nuisances and prescribing a remedy by action does not take away any common law remedy in the abatement of nuisances which the statute does not embrace.

Appeal from the District Court of the Tenth Judicial District, Nevada County.

ALEXANDER ANDERSON and J. W. G. SMITH, for appellants.

BUCKNER & HILL, for respondent.

BRYAN, J., delivered the opinion of the court. HEYDENFELDT, J., concurred.

This cause comes up upon the following state of facts: The respondent purchased from miners upon "Lawson's Ravine," in the county of Nevada, certain mining claims situated upon the ravine, which had been held and worked for several years. A large surplus of water from the debouching of foreign ditches passed through the ravine, which was used by the miners upon the ravine in the washing of the gold-bearing earth and the removal of tailings from their claims. Subsequently to the location of mining claims upon the ravine, a portion of the plaintiffs below erected a dam for the purpose of turning the water into a mill-race, and conducting the water to a mill occupied by them. The respondent and others, mining upon the ravine, complained of the erection and retention of the dam as injurious to the free use of their mining property above the dam, by flooding their ground with water and preventing an outlet to the tailings from their claims. Notice

[1] *Wetmore* v. *Tracy*, 14 Wend. 250; *Roberts* v. *Rose* 14 M. R. —.

was given, as appears by the evidence sent up, to the plaintiffs below, to remove or open their dam on account of the injury it was working to those above.

The plaintiffs below not removing their dam, respondent Laird, with others, proceeded, as they attempted to establish by proof, in a peaceable manner to remove the dam themselves, and abate the same as a nuisance.

This action was brought against them for damages in the court below upon the account of the removal above alluded to, and the jury found a general verdict for the defendants. The plaintiffs appeal and assign as error the charge of the court to the jury and errors of law occurring at the trial.

Appellants' counsel rely for error, first, upon the charge of the court below to the effect that if the jury believed from the evidence that plaintiffs had so extracted the waters in "Lawson's Ravine" by means of their dam, as to create a nuisance to those working in the neighborhood who were first in their location of claims upon the ravine, then the jury should find for the defendants.

I deem the instructions given by the court to have been proper. The statute of this State defining what are nuisances and prescribing a remedy by action does not take away any common law remedy in the abatement of nuisances which the statute does not embrace.

The rules of the common law were so far adopted in this State as to supply any defect which might exist in the statute laws by furnishing additional remedies for the correction of wrongs. It matters but little whether the nuisance complained of in this cause is called private or public at the common law; if either, it could be abated by the party aggrieved, if performed without a breach of the peace. Blackstone, in book III, page 5 of his Commentaries, defines a nuisance and its remedy thus: "Whatsoever unlawfully annoys or doth damage to another is a nuisance, and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as to commit no riot in the doing." So it has been held in the English courts, "that if a person upon his own soil erect a thing that is a nuisance to another, as by the stopping a rivulet, and thus diminish the water used by his cattle, the party injured may enter upon the soil of the other and abate the nuisance."

2 Smith's R. 9; Comyn's Digest, title Pleader. So the general doctrine has been held in *Hart* v. *Albany*, 9 Wend. 571. The same doctrine is also held in Angell on Water Courses page 426, that a private nuisance may be abated by the party aggrieved if it is done peaceably and without a breach of the peace.

The obstruction of the water in the Lawson ravine was a common injury to many at work upon the ravine who had, by the necessary implication of the laws of the State which relate to mines and miners, a species of property in their mining grounds, which they had a right to protect (if they were first in the appropriation of the water for mining uses) by peaceably abating the nuisance. It might also be well deemed a private nuisance as to the particular mining grounds of defendants injured by the obstruction (as in the case above of one obstructing a rivulet out of which another's cattle drank), and being such a nuisance and hindrance to the enjoyment of a recognized property in this State, the defendants had a right to remove the dam if done in a peaceable manner. We will not permit ourselves to go behind the verdict of the jury to ascertain the facts as to the priority of the parties in their location upon the ravine. From the verdict of the jury this court will presume that the defendants were proven to have had the oldest right to the natural flow of the water in the ravine. Whether the purchase of Laird was proper or not could make no difference in this cause. Laird proceeded with others, who were made defendants in the action, to remove the dam, all of whom asserted rights which they claim to have vested prior to the erection of the same by plaintiffs.

I consider that the points made upon appeal are not well taken, and the judgment of the court below must be affirmed with costs.

WHEATLEY v. CHRISMAN.

(24 Pennsylvania State, 298. Supreme Court, 1855.)

[1] **Right to use of water.** A proprietor of land over which a stream of water runs, has, as against a lower proprietor, the use of only so much of the stream as will not materially diminish its quantity or corrupt its quality. His right is not to be measured by the reasonable demands of his business.

[2] **Water for farm purposes polluted by mines.** Where the lower proprietor had a right, by deed from the then upper proprietor, to erect a dam on the land of the latter, in order to convey a portion of the water through an artificial channel for the purpose of watering his meadows, but had actually used it for above twenty-one years for watering horses and cattle, it was *held* that such use for above twenty-one years entitled him to it, and that he might maintain suit against one claiming under the former upper proprietor for polluting the stream so as to render it unfit for his cattle.

[3] **Animus—Where immaterial.** Where the claim of the plaintiff is only for compensatory damages, and not founded on the *animus*, but on the acts of the defendant, it is not material whether or not the defendant knew the extent of the injury he was committing.

Error to the Common Pleas of Chester County.

This was an action in case by *John Chrisman* v. *Charles M. Wheatley*, to December term, 1853, for having diverted a portion of the water of a small stream from its natural channel, and also for having corrupted the water in the natural channel, part of which flowed into an artificial channel, to the injury of the plaintiff.

The stream of water, in its natural channel, flowed over the land of Chrisman, the plaintiff. In 1791 the farm of the plaintiff, and also the farm a part of which was occupied by the defendant, belonged to Lewellyn Davis, who, on 21st February of that year conveyed to his son, Joshua Davis, the farm of 96 acres and 86 perches, now belonging to the plaintiff, together with the privilege of digging and keeping in repair a dam and artificial watercourse leading from the stream on the upper tract, belonging, at the time of the trial, to Jo-

[1] *Union Mill Co.* v. *Dangberg*, 8 M. R. 113.
[2] *Att'y Gen.* v. *Steward*, 20 N. J. Eq. 415; *Crane* v. *Winsor*, 2 Utah, 248.
[3] *Maye* v. *Yappen*, 10 M. R. 101.

seph Funk, and through a part of said tract into the farm conveyed to said Joshua Davis. The watercourse was stated in the deed to be "for the use and purpose *of watering the meadows* in the above described tract of land for the use and benefit of Joshua Davis," his heirs and assigns, for six days out of seven, when needed for that purpose; and at all other times; and when not so needed, the water was reserved for the use of the upper tract. The artificial watercourse leads along a meadow bank, and passes through the plaintiff's barnyard (where he was accustomed to use it to water his horses and cattle) to another meadow.

The defendant was the manager of lead mines of the Brookdale Mining Company, whose works were on land leased from the said Joseph Funk, being a part of the upper tract of Lewellyn Davis and also of works of the Wheatley Mining Company; and it was alleged by *the plaintiff* that impure water from the mines was pumped up into the channel of the stream so as to render it unfit for watering his cattle and for domestic purposes, and that the water was diminished in quantity.

On the trial, the deed to Joshua Davis was given in evidence on part of the *plaintiff;* and testimony was given to show that the water of the stream was diminished in 1853, and that it was caused by a portion of the stream being carried to the Wheatley Works.

On part of the defendant, evidence of a contrary character was given, and that the water from the mine was not usually unfit for the use of horses and cattle.

After the *defendant's* case was closed, the *plaintiff* offered to prove that he had enjoyed the use of the water for watering his cattle in the fields and barnyard for above twenty-one years. It was objected that such evidence was contrary to the limitation in the deed. The objection was overruled, and evidence was given of the plaintiff having used the water of the ditch for twenty-five years for watering his cattle.

The plaintiff also offered to prove that the water in the artificial channel was muddy and unfit for watering cattle. This was objected to as immaterial, but was admitted.

The defendant's counsel, in their second point, asked the court to instruct the jury that the *defendant* was entitled to

a reasonable use of the water for the purpose of his business, and that if the jury believed that no more than a reasonable quantity for such purpose was used, as for the creation of steam to drive his engine, the plaintiff had no cause of complaint. The court declined to affirm the point.

The defendant's counsel, in the third and fourth points, also asked the court to charge that the plaintiff's right under the deed to Joshua Davis was not to be extended to admit of compensation on account of the water in the artificial watercourse being rendered unfit for watering his horses or cattle.

HAINES, president judge, charged that the defendant, claiming under the owner of the upper tract, had the right to the use of the stream on his land for any legal purpose, provided he returned it to its channel uncorrupted and without any essential diminution; and that the size and capacity of the stream should be considered; and that any interruption of the plaintiff's rights, whether those of a riparian owner or by means of the artificial construction on his own ground, was an injury for which an action would lie, unless too trifling for the law to notice.

He further charged that though the plaintiff's claim *under the deed* was not to be extended beyond its terms, or to purposes not contemplated in it, yet that if the plaintiff showed a use by him of the water for twenty-five years, for purposes not granted by the deed, or adverse to it, the plaintiff had a right to recover damages for any essential, perceptible diminution or impurity affecting such right.

January 8, 1855, verdict for plaintiff for $341 damages.

Error was assigned, first, as to the admission of testimony as to the use of the water for watering cattle for above twenty-one years; second, in admitting testimony to show that the water in the artificial channel was rendered muddy or impure; third, to the charge, in reply to the second point, that the defendant was not entitled to the use of a reasonable quantity of the water for his business, etc.; and fourthly, to the charge in reply to the defendant's third and fourth points.

LEWIS, for plaintiff in error.

HICKMAN and PENNYPACKER, for defendant in error.

The opinion of the court was delivered May 21, 1855, by BLACK, J.

There was no trouble in the court below, and there can be none here, about determining what are the main and principal rights of the parties in regard to the subject-matter of the controversy. A small stream of water runs through the land of both. The defendant is the upper and the plaintiff the lower proprietor. It is asserted that the defendant, who is working a lead mine, has corrupted the water and sensibly diminished the volume of the stream. If either of these allegations be true, the plaintiff has a right to recover in this action; and if one verdict be not enough to make the defendant discontinue the nuisance, a second jury will be instructed to give such damages as will cause him to wish that he had taken the warning of the first. The wrong must cease, no matter how trifling it may seem. The right of the plaintiff is absolute to be restored to the full enjoyment of his own property, and is not dependent in any manner upon its value either to himself or his adversary.

We are quite content with the exposition which the judge of the common pleas gave of the law which governs the owners of lands through which a stream of water passes. His definitions of their rights and obligations is accurate as well as clear. There is indeed no complaint of anything he said on this branch of the case, except his refusal to affirm without qualification one of the defendant's points; and if there be a part of the charge better entitled to our approbation than any other, it is the answer to that point. The proposition of the defendant was, that he had a legal right to use a *reasonable* quantity of the water for the purposes of his business. The court replied that his business might reasonably require more than he could take consistently with the rights of the plaintiff. We can not see how or on what principle the correctness of this can be impugned. The necessities of one man's business can not be the standard of another's rights in a thing which belongs to both. The true rule was given to the jury. The defendant had a right to such use as he could make of the water without materially diminishing it in quantity or corrupting it in quality. If he

needed more, he was bound to buy it. However laudable his enterprise may be, he can not carry it on at the expense of his neighbor. One who desires to work a lead mine may require land and money as well as water, but he can not have either unless he first makes it his own.

For upward of twenty-five years the plaintiff and those under whom he claims have maintained a dam across the stream above his own line and on the land occupied by the defendant. By means of this dam a portion of the water is diverted into a ditch, and is led along a higher part of the plaintiff's farm than that through which it flows in the natural channel. It is thus carried to the plaintiff's barnyard, whence it is suffered to return again to the channel. Ever since the erection of the dam the owners of the plaintiff's farm have used the water running in and from the ditch for the watering of cattle as well as for the irrigation of the meadows. Evidence was offered and admitted to show that the water was rendered so impure by the defendant's work that it was unfit for beasts to drink. This was introduced solely to swell the damages; for the plaintiff could sustain his action and compel an abatement of the nuisance without any reference to the dam or the ditch, or the use he made or might make of the water so diverted, provided it be true that the water in the natural channel was corrupted or diminished; and if it was not so corrupted or diminished, he could not recover at all. But the fact that the plaintiff was using and had a right to use it in this particular way, for a purpose important to himself, does entitle him to larger damages than he would be able to get by merely proving that his legal right as a proprietor had been violated without causing him any special loss or injury. The admission of this evidence therefore must have had some influence on the verdict, though its exclusion could not have defeated the action.

Every one will admit that a person, through whose land a stream runs, may conduct it by an artificial channel to any part of his farm where he thinks it will be best for him to have it. He may use the part so diverted for the same purposes and to the same extent that he could use it if it flowed there through a natural channel, and may recover the same damages for any loss occasioned by the interference of another with his use of

it. Neither is it contended that the fact of the dam, by which the water is diverted, being in this case above the plaintiff's line and on land not his own, makes any difference, if the dam be a lawful structure, which he has a right to maintain. The plaintiff's right to maintain this dam is not disputed; and if it were, his actual maintenance of it for upward of twenty-one years would settle it at once. The evidence that he has during all that time turned the water out of its natural channel at a point above his own line and by means of an artificial channel carried it to his buildings, and there used it for watering his cattle, does make out a *prima facie* case for any damages he may have suffered in consequence of the water being so corrupted that he could no longer use it in that way.

But there is another fact in the case which the defendant's counsel insist is totally destructive of the plaintiff's right to recover for this specific injury. It is this: The dam was originally built in pursuance of an express grant by deed from the upper proprietor to the owner of the lower farm. This deed gives the right to divert the water for the use and purpose of watering the meadows of the grantee. The argument is that the plaintiff could rightfully make no use of the water other than what the deed mentions, namely, the irrigation of meadows; that a different use of it, no matter how long continued, could raise no presumption of any other right than that which the deed gives, and that therefore when the water was so corrupted that the plaintiff's stock could not drink it, he was disturbed, not in the enjoyment of a right, but in the perpetration of a wrong. If these propositions be sound the judgment ought to be reversed. The principal stress of the argument before us by the counsel of either side, was on the question whether a person to whom an easement like this has been granted by deed, for a specified purpose, may use it twenty-one years for a different purpose, and then claim a right by prescription to the whole extent of his user. It does not appear that the point has ever been decided. We must ascertain the true rule as well as we can by the analogies of the law, and by a reference to original principles.

One who is in possession of land is deemed to be there by virtue of his title, if he has one. Upon this principle, a tenant for years, or for life, or for any other particular estate,

cannot claim the fee and hold the land under the Statute of Limitations, after twenty-one years. Neither can a trustee or mortgagee, in possession, be permitted to set up an absolute title in himself. The quantum of interest, the duration or character of the estate which a person has in lands or tenements over which he is exercising actual dominion, must always be ascertained from the deed, record, or contract, if there be any, under which he has a right to hold it. Of lands which are unimproved the constructive possession will also be confined to that part which is covered by the title. But where a man has a good title for one acre, and he goes into actual possession of that and also of another acre adjoining, there is no rule of law which forbids him to hold both after a lapse of twenty-one years. The last case, we think, is most analogous to the matter before us. When an easement is granted for one purpose, and the grantee exercises the right mentioned in the deed, and another right also, he is not less secure against all interruptions of either than he would have been if no express grant at all had been shown. It is as easy to presume another grant for watering horses, superadded to that for watering meadows, as it would have been, in the absence of any deed, to presume that there was a grant for both together. If one man has a right of way over another's field, which he has exercised without interruption for twenty-one years, it will scarcely be contended that his right could be destroyed by showing that he had a deed for a similar right of way over a different field. It is almost equally clear, that if I grant a right to pass over my land on foot, and the grantee, instead of confining himself to that mode of passage, goes over it continually, for twenty-one years, with wagons and horses, a grant for the latter purpose ought to be presumed in addition to that of the footway.

It is contended that, because the proprietor of the land above could not prevent the watering of cattle at the ditch, because it was not injurious to him, because he could not sue for such a use of the water—no presumption against him can arise from his omission to stop it. This argument proves too much. If it be true, it shows that the right to water stock out of the ditch was inseparable from the right to have the ditch there for the other purpose. Perhaps this is the best solution

of the whole difficulty, and the truest view that can be taken of the ubject. If the water can not be used for irrigation without rendering it liable to be innocently and rightfully used for watering cattle also, then the express grant of the former privilege implies a grant of the latter.

We are quite clear that the plaintiff had a right to the water of the stream in its natural condition, the part that flowed in the ditch no less than the other; that the pollution or material diminution of it was a wrong, and that the court and jury were right in giving damages for every injury which was the direct, immediate, and necessary consequence of that wrong.

The claim of the plaintiff being only for compensatory damages, and not being founded on the *animus*, but on the acts of the other party, it can be a matter of no consequence whether or not the defendant knew the extent of the injury he was committing.

Judgment affirmed.

TENNEY v. THE MINERS' DITCH CO.

(7 California, 335. Supreme Court, 1857.)

[1] **Claim injured from ditch located prior thereto.** Plaintiff sued for an injury done to his mining claim by the breaking of defendant's canal, which was constructed prior to the location of plaintiff's claim; neither party claimed ownership of the soil, and no negligence in fact was shown: *Held*, that the rights of the parties were acquired at the dates of their respective locations, and that the rule of "coming to a nuisance" might be applied.

Prior appropriation as affecting accidental injuries. There is no doubt that ditch owners would be responsible for wanton injury or gross negligence, but they are not liable for a mere accidental injury to a claim located subsequent to the construction of the ditch, if no negligence is shown.

Appeal from the District Court of the Fourteenth Judicial District, County of Nevada.

The plaintiff brought his action for damages to his mining

[1] *Clark* v. *Willett*, 4 M.R. 629.

claim, sustained by reason of the breaking away of a portion of defendants' ditch, owing to the careless manner of its construction, and the consequent overflowing of plaintiff's claim. It appeared by the record that plaintiff had located his claim subsequent to the construction of defendants' ditch. The question of negligence was submitted to the jury as a question of fact, under the instructions of the court below, and they found a verdict for the defendants. The substance of the evidence on the question of negligence is stated in the opinion of the court, as well as the instructions asked by plaintiff and refused by the court below, which refusal is assigned as error. Motion for a new trial was made and overruled, and judgment entered for defendants.

Plaintiff appealed from the order overruling the motion for a new trial.

HENRY MEREDITH, for appellant.

MCCONNELL, for respondents.

MURRAY, C. J., delivered the opinion of the court, TERRY, J., concurring.

This was an action of trespass on the case for negligence in constructing a water ditch so that it gave way and flooded the plaintiff's mining claims. Judgment for the defendants, and motion for new trial overruled, from which plaintiff appeals.

The error assigned by the appellant is the refusal of the court to give the following instruction: "That when a ditch is insufficient, and breaks from the weight or quantity of water permitted to flow through the same, the law presumes negligence in its construction or continuance; and if from the evidence the jury believe that the defendants' ditch was insufficient to carry the water and broke from the weight or quantity allowed to flow through the same, and that the plaintiff was injured by such breakage, the jury will find for plaintiff." The correctness of this instruction must depend upon the testimony before the jury.

It appears from the record that the question of negligence

had been submitted to them as a question of fact under the instruction of the court; that evidence had been introduced by the defendants to disprove the charge or exculpate themselves. It was shown, among other things, that the sides of the ditch at the place it gave way had been dug down or injured by some burrowing animal, and also that a tree had accidentally fallen across it, causing the water to dam up, and thereby creating a greater pressure upon the sides of the ditch. It was further shown that the defendants had located and constructed their ditch previous to the location of the plaintiff's mining claims. No negligence, in fact, was shown, other than that which the law would presume from the breakage of the ditch.

The important fact having been admitted that neither of the parties claim as holders of the soil, but simply by virtue of location or appropriation, it becomes necessary to ascertain what rights the plaintiff, who was a subsequent locator, acquired against the defendants.

Some of the earlier English authorities recognize the doctrine that a person may (even as between owners of the soil) construct or continue what would otherwise be an actionable nuisance, provided that, at the commencement of it, no person was in a condition to be injured by it; or, in other words, that mere priority as between owners of the soil gave a superior right. If a person afterward, by building or otherwise, put himself in a situation to be injured by such structure, it was termed "coming to a nuisance."

This doctrine has long since been exploded on the most obvious principles of sound reason. The right of the owner of the soil to the free use and enjoyment of the same is held to exist anterior to any erection that may be made by an adjoining proprietor, and in such cases the maxim "*sic utere tuo ut alienum non lædas*" applies. It will be observed that the reason of the rule is founded on the ownership of the soil, and that as between proprietors the same rights or privileges are supposed to exist (except in some few instances); but in a case like the present, where neither party claims an ownership in the soil, and all the rights they possess relate back, or are acquired at the date of their respective locations, the reason of the rule ceases, and the maxim, "*qui prior est in tempore*,

potior est in jure," as applied by this court to cases involving disputes growing out of mining claims, would seem more applicable.

In fact, any other rule would allow a malevolent person to make a trespass whenever he pleased, by settling along the line of a water ditch or canal, where he supposed from its location, or construction, it was most likely to give way. There is no doubt that the owners of a ditch would be liable for wanton injury or gross negligence, but not for a mere accidental injury where no negligence was shown. In such cases, the maxim, "*sic utere*," etc., must be construed with reference to the rights of all the parties concerned, and no man can be deprived of the due enjoyment of his property and held answerable in damages for the reasonable exercise of a right: 15 Johns. 43; 17 Johns. 99; 6 Johns. 90; and 3 Mann. & G. 315. In the latter case it was held that a railroad company were not liable for damages cause by fire from sparks from their engine, unless negligence was proven by the plaintiff.

Having thus established what we believe to be the law of the case, it follows that the court properly refused the instruction asked.

Judgment affirmed.

TUOLUMNE WATER CO. v. CHAPMAN ET AL.

(8 California, 392. Supreme Court, 1857.)

[1] **Injunction against diversion of water—Pleading.** In the complaint it was alleged that plaintiff had for several years conveyed water down a certain gulch for mining purposes, and had acquired a prior right to the enjoyment and use of the water; that defendants had diverted the water and deprived plaintiff of its use, and that defendants wrongfully claim some pretended and fictitious right to the use of the water. *Held*, that the allegation of defendants' pretended right did not prejudice the right of the plaintiff to an injunction.

[2] **Remedy in equity for diversion of water.** Diversion of a watercourse is a private nuisance; and while no equitable remedy can be had for a mere past diversion, yet a continued diversion is such an irreparable injury as equity will redress.

[1] *Higgins* v. *Barker*, 7 M. R. 525.
[2] *Barkley* v. *Tieleke*, 4 M. R. 666.

[1] **Title admitted by demurrer—Injunction.** When the defendants by demurring to the complaint have admitted the right of the plaintiff to the use of the water in controversy, the plaintiff may have an injunction against its diversion without first establishing his title by an action at law.

Appeal from the District Court of the Fifth Judicial District, County of Tuolumne.

It is alleged in the complaint that the plaintiff is an incorporated ditch company, and for several years past has conveyed water by means of a ditch from the Stanislaus river, into French gulch, and down said gulch, for sale to others, to be used for mining purposes, and by that means had acquired a prior right to the enjoyment and use of the water; and that being so in the peaceable possession and use of the water flowing in said ditch and gulch, the defendants diverted the water from said gulch, and deprived the plaintiff of its use and enjoyment, and still continued to do so, and refused to desist therefrom, and wrongfully claim some pretended and fictitious right to the use of the water, to the great and manifest injury of the plaintiff. The prayer of the complaint is for a decree forbidding defendants from using or diverting the water for a temporary injunction, and upon the final hearing that the injunction be made perpetual. To this complaint the defendants demurred, which being sustained by the court below, the plaintiff appealed.

H. P. BARBER, for appellants.

WOLCOTT & GREENWOOD, for respondents.

BURNETT, J., after stating the facts, delivered the opinion of the court, TERRY, C. J., concurring.

The demurrer admits the facts as alleged in the complaint: 3 Cal. 323.

The alleged allegation in the complaint, that the defendants wrongfully claim some pretended and fictitious right to the use of the water, does not prejudice the right of the plaintiff to the injunction: *Merced M. Co.* v. *Fremont*, 7 Cal. 317.

[1] *Gibson* v. *Gibson*, 46 Wis. 462.

The diversion of a watercourse is a private nuisance: Willard's E. J. 392; Adams' E. 310; Story's E. J. Sec. 927.

There can be no doubt of the truth of the proposition, that no equitable remedy can be had for a mere past diversion of a watercourse, but where the injury is continuing, relief may be appropriately sought in equity. It is only in equity that future injury can be restrained. Continued diversions of water from a party entitled to it, is such an irreparable injury as a court of equity will redress.

But in this case it is insisted by the defendants that the reinedy by injunction can not be maintained until the plaintiff has established his title by a suit at law.

The only object in establishing title at law is to show that the right is in the plaintiff. The suit at law is only a means to accomplish a given end. When the end is already obtained there could be no reason for doing an idle thing. This the law, as a rational system, never requires to be done. If the title of the plaintiff be conceded, then there can be no need of a trial at law to establish that which is already admitted: Willard's Eq. 392; 6 How. Pr. 89.

By the demurrer in this case the defendants admit the right of plaintiff to the water in the gulch; that they have wrongfully diverted it, and continued to do so, and refuse to desist, under a fictitious claim of right.

It is not a mere fictitious claim of right that will prevent the injunction. Suppose the defendants had stated in their answer that they admitted the right of plaintiff to the use of the water, but also insisted that they had a pretended and fictitious claim to it, then there could have been no necessity of trial at law under such an admission. Had the defendants answered denying the right of the plaintiff, and claiming title themselves, then a very different question would have been presented, in reference to which it is not now necessary to express any decided opinion. But it may admit of doubt whether, under our system, where the same court administers both law and equity and the distinction in pleading is abolished, the former rule would apply without qualification.

BANKART v. HOUGHTON.

(27 Beavan, 425. The Rolls Court, 1859.)

Damages, without injunction. Though A may be disentitled, by acquiescence, to an injunction to stop B's works, which are noxious to the neighborhood, yet it does not follow that B is entitled to an injunction to prevent A's recovering damage at law. Equity may leave both parties to their legal rights.

[1] **Enlargement of works originally erected with acquiescence.** Acquiescence in the erection of noxious works while they produce little injury does not warrant the subsequent extension of them to an extent productive of great damage.

Application of the rules above stated. Injunction to prevent (on the ground of acquiescence) a party injured by copper works from collection of a judgment in damages obtained at law for the injury, refused with costs.

In 1849 the plaintiff became the under lessee of some spelter and zinc works called "The Red Jacket Works," in the county of Glamorgan, and he thereu on adapted them to the manufacture of copper, which he commenced in that year.

In 1853 the defendant became the occupier of two farms in the neighborhood of the works, called "Coed-y-Arl Uchaf," and "Coed-y-Arl Ishaf." The first nearly adjoined the works.

In the reduction of copper ores noxious vapors are liberated, and these exhalations and the deposit they produce are highly injurious to vegetation and to animals that feed on the pastures within the influence of them. The evidence in the cause showed that it was not until 1853 that any material injury was done by the works to the defendant's farm. Up to that time the roasting furnaces, which principally produced the injury, were but three, but they were afterward increased to seven. Neither the defendant nor his predecessor, Jacob Williams, took any legal steps to prevent the nuisance arising from the noxious vapors produced from smelting the copper, or to stop them.

The nuisance went on increasing, and in 1856 the defendant brought an action at law against the plaintiff for the injury done to his farms. The action was tried in July, 1858, and the jury awarded the defendant damages to the extent of £450.

[1] *Heather* v. *Pardon*, 37 Law T. O. N. S. 393.

The plaintiff thereupon filed this present bill against the defendant, alleging that he had expended large sums of money on the enlargement and improvement of the works, with the full knowledge, privity and approbation of the defendant's lessors, who, as the plaintiff alleged, had acquiesced in and encouraged it. The plaintiff also alleged that the defendant, before he became the occupier of the farms, inspected the works with a view of estimating the injury likely to be occasioned thereby to the farms, and that before he acquired any interest in the farms he had full notice of all the plaintiff's rights in respect of the carrying on the works, and was well aware that the plaintiff claimed such rights.

The bill alleged that the defendant had not interfered or complained until shortly before the action.

It prayed that the defendant might be restrained from taking out execution in the action and from all further proceedings therein, and from commencing any other action at law, against the plaintiff, for any injury alleged by the defendant to be occasioned to his lands or any of them, by the carrying on of the plaintiff's works. And if the defendant should in the meantime have taken out execution in the action, that he might be decreed to repay to the plaintiff all moneys recovered by him under such execution, and that the plaintiff might be quieted in the use, enjoyment and carrying on of his works.

The evidence did not bear out the allegation of the plaintiff and the acquiescence proved rather amounted to passive non-interference than active encouragement. But it appeared that the termors and the tenant who had assigned the lease to the defendant, and the defendant himself when he took the farms, were all aware of the existence of the works, and had taken no steps before the action at law to prevent the manufacture or the enlargement of the works.

A motion was now made for an injunction.

Mr. R. PALMER, Mr. PULLEN and Mr. CADMAN JONES, in support of the motion.

Mr. LLOYD, Mr. GROVE and Mr. HOBHOUSE, for the defendant.

THE MASTER OF THE ROLLS.

This is an application for an injunction to restrain the defendant from taking out execution in an action in which he has obtained judgment against the plaintiff in equity, and from commencing any future action against him for the injury alleged to have been done by him to the defendant.

The injury done to the defendant in equity by the plaintiff is occasioned by the exhalation and deposit from the works of the plaintiff, which affect the land of which the defendant is tenant, and the ground on which the plaintiff rests his case is, the acquiescence or encouragement of the defendant, or of those under whom he claims and by whose acts he is bound. The fact of the damage is not in dispute; this has been carefully examined by the trial at law, where, after a lengthened examination, the jury assessed the damage sustained by the defendant in equity, up to that time, at £450. The damage is a constantly recurring injury, which goes on from day to day, and which is daily giving rise to fresh causes of action.

There are two questions to be considered in this case —first, the extent of the acquiescence alleged and proved, and next the legal consequences of such acquiescence as is proved.

On the fact of acquiescence, this is proved, and indeed is not contested on the side of the defendant—that the termor and the defendant himself, when he took the farm, were well aware of the existence of the works, and that the tenant who assigned the lease to the defendant had seen them while they were being erected, and that he did not take any steps to prevent such erection.

These facts are very material for some purposes; and, accordingly, if the present case were reversed, and the defendant Houghton were here as plaintiff, seeking the aid of this court for an injunction to restrain the plaintiff Bankhart from permitting the noxious effluvium and vapor to issue from his furnaces and to be deposited on the defendant's land, I should be of opinion, that the defendant, by the facts I have mentioned, had debarred himself from any right to obtain such relief as an injunction, and that he must be left to his remedy at law. But it is a totally different matter when the party who commits the injury and against whom no injunction is sought, comes here and calls upon the court to interfere to prevent the defendant from ob-

taining that legal remedy to which *prima facie* he would be entitled.

The way in which it is put for the plaintiff in equity is this:—It is said that in a district where the effects of copper smoke are widely felt and plainly understood, a tenant who takes land adjoining copper-works, or such works then in the course of erection, and who makes no objection to them, must be held to have acquiesced, not only in the evil produced by the works then in the course of erection, but also in all that which may thereafter be produced by their extension; that the addition to the works is a natural consequence of their existence and that the tenant can not afterward complain of the effects of the smoke, which, flowing from the works then existing or thereafter to be added, he must have foreseen and of which he did not complain.

I think the case a very simple one; I do not think it necessary to go in detail through the evidence which has been adduced on either side. There is a conflict of testimony on the question whether the acquiescence of Jacob Williams, the former tenant, under whose assignment the defendant holds a portion of the land, was obtained by reason of his trusting to an assertion made by the plaintiff's son that they were in possession of a patent process by which the copper smoke would be rendered innocuous. In my opinion, it is unnecessary to consider that question, for, upon the fullest concession to the plaintiff of the truth of all the facts he alleges, his case wholly fails on the merits, and the facts on which he relies do not justify the legal inference he attempts to draw from them.

The roasting furnaces are said to be those which principally produce the injury. The original number of roasting furnaces was small—I think three only. In 1853 they were increased to seven, and since the trial at law another has been added. The evidence shows that it was not till 1853 that any damage was sustained from the works which was then but slight. I think it impossible to be reasonably contended, that, because a man has acquiesced in the erection of certain works which have produced little or no injury, he is not afterward to have any remedy, if, by the increase of the works at a subsequent period, he sustains a serious injury. But this is what the plaintiff must establish: He must satisfy the court that it

ought to interfere to debar the defendant from obtaining that compensation at law which he would *prima facie* be entitled to. I am unable to accede to the argument that the defendant must be held to have foreseen and to have assented, as a probable consequence, to the great and injurious additions which have been made to the works. The highest that it can be put is, that he assented to what was done and to the consequences that were necessarily to be derived from that, but no further. The consequences of going further would be most injurious, and would be unwarranted by any authority that I am aware of. It would follow that a partial obscuration of ancient lights, if assented to, involved a consent to their total obscuration, and that any easement assented to might be increased at the pleasure of the grantee, provided it could be shown that the increase was only a probable consequence of the use of the easement, if found beneficial. But I do not assent even to the extent of the first limited statement of the proposition. It may well be that a person's assent is given under an erroneous opinion and view and in ignorance of the consequences. Is that mistake of fact to bind him from thence forward and forever? I think not. The court holds, in cases of election, that a man is not to be considered bound by an election which he has made in ignorance or mistake of the real facts of the case. Undoubtedly there is this important consideration to be borne in mind in dealing with such cases, viz., whether the court can replace both parties in exactly the same situation as they were in when the first act was done by one side and acquiesced in by the other. If it can, it may probably be the duty of the court to do so. But if the court can not replace the parties in the same situation in which they were before, its usual course is, to decline all interference. Accordingly, here, as I have already stated, if the defendant were plaintiff, and coming for an injunction, I should, upon the facts I have stated, leave him to his legal remedy. But it is an error to suppose that the opposite of that proposition holds good, and that because the court could not interfere to assist the tenant of the adjoining lands against the person who erected and owns the works, it will therefore interfere to assist the latter against the tenant.

I am satisfied, on the evidence, that the defendant did not know what the injurious consequences would be to his crops

and flocks, and the most favorable way I can put it for the plaintiff is, to believe that he was equally ignorant.

If the plaintiff knew these consequences and the defendant did not, then, either intentionally or unintentionally, the plaintiff was obtaining an undue advantage over the defendant. But if they were both equally ignorant of these consequences, why is the defendant to be made to suffer for his ignorance more than the plaintiff? Why is this consent to the erection of works which were not expected to injure and did not injure the land at that time, to confer on one that right to erect works in addition which will destroy the whole property and entail on the other the incapacity to make any objection?

I am of opinion that the defendant and Jacob Williams, under whom he claims, never assented to the erection of any works of the extent which have been subsequently made, and that his assent was to the limited extent in which they existed at that time, and that such assent can not be enlarged. If the proper remedy be the legal one, the defendant has deprived himself of all remedies except his legal remedies, but he has not deprived himself of these. Both parties have mutually taken the case out of the jurisdiction of equity; injunctions and prohibitory orders have nothing to do with this case on either side; their rights and their defenses are legal, to be estimated in damages, and which, up to the time of the trial, have been ascertained at law, and which for the future will be better ascertained at law than they can be in this court.

It is necessary, in order to avoid misconception as to the view which I have taken of the case, and the observations I have made on the ignorance of the consequences of his assent being not binding on the assenting party, to distinguish between the case where the consequences of the act assented to are obvious and plain, and another where they are necessarily doubtful. This may be easily illustrated. For instance, if a neighbor permit me to open a window overlooking his close, he knows the exact consequences of that permission, namely, that he is liable forever after to be overlooked, and that he can not afterward so build on his close as to obscure that window. This is the extent of the injury which can be produced, and he can not say that he did not foresee it. So, also, if he allow another a right of way across his meadow, he knows

and can accurately estimate the extent of the injury that will result from such permission. But if a copyholder allows the lord of the manor to work the coals under the close of the copyhold, by offset out of the adjoining land, does it therefore follow that if the lord, in winning coal, works so near the surface as to destroy the farm buildings of the copyholder, he is to have no remedy at law for the injury so done to him? Could the lord be permitted to allege in this court that the copyholder must have known that the coal lay near the surface, and that such a result was probable from its having often occurred in the neighborhood? Certainly not; but in truth, all such illustrations present a weaker case than that before the court, and the strongest illustration of the distinction to be taken in such cases appears to me to be the case of works erected which at first seem to be and are innocuous, and which afterward, by addition, become seriously injurious to the proprietors of the neighboring lands.

This is exactly the case where equity declines to interfere upon either side, and leaves the parties to their legal rights and legal liabilities. In my opinion, therefore, the case of the plaintiff fails, and the motion must be refused, with costs.

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[1] TIPPING V. THE ST. HELEN'S SMELTING COMPANY (LIMITED).

(4 Best & Smith, 608. Court of Queen's Bench, 1863.)

Noxious vapors from smelting works. In an action for a nuisance to a messuage, dwelling house and premises caused by noxious vapors proceeding from smelting works upon land of the defendants, to which the defendants pleaded the general issue, the judge laid down the law to the jury that every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless by the lapse of a certain period of time he has acquired a prescriptive right to do so.

Idem—But that the law does not regard trifling inconveniences; every thing must be looked at from a reasonable point of view; and therefore

[1] Affirmed in Exchequer Chamber, 11 M. R. 49, and in House of Lords, 11 M. R. 50.

in an action for nuisance to property by noxious vapors arising on the land of another, the injury, to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That in determining that question, the time, locality and all the circumstances should be taken into consideration; that in counties where great works have been erected and carried on, which are the means of developing the national wealth, persons must not stand on extreme rights, and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in those places. And he directed them to find accordingly. *Held*, no misdirection.

This was an action for a nuisance, which was commenced on the 25th May, 1863. The declaration alleged that, "before and at the time of the committing of the grievances hereinafter mentioned, the plaintiff was possessed of a messuage and dwelling house and premises, with the appurtenances thereof, in which he then dwelt, and still dwells, with his servants, and of gardens and parks, and farms, land and messuages thereon, adjoining and near to the said dwelling house, and was also entitled to the reversion of certain other lands and premises near and adjoining thereto, which were then respectively in the possession of certain persons as tenants to the plaintiff. Yet the defendants, contriving and intending to injure and annoy the plaintiff, erected and made and used, and continued to use, certain smelting works upon certain lands of the defendants, near to the plaintiff's said dwelling house, messuages, lands and premises, and wrongfully and injuriously caused to issue and proceed from the said smelting works large quantities of offensive, noxious, poisonous and unwholesome smokes, stinks, stenches, gases and other vaporous and noxious matters, and to spread and diffuse themselves over, upon, into, through and about the plaintiff's said dwelling house, messuages, lands and premises respectively, and impregnate and corrupt the air, and settle and deposit themselves on the soil and surface of the said lands and premises respectively, and on the hedges, trees, shrubs, fruits, crops and herbage thereon." Averment: that, "by reason of the defendants' said acts the said hedges, trees, shrubs, fruits and herbage were greatly injured and deteriorated in value and destroyed, and the cattle and live stock of the plaintiff on the said lands and premises became unhealthy and diseased, and the plaintiff

and his servants became disordered and sick, and the plaintiff's said dwelling house and premises were less comfortable and wholesome and fit for habitation, and the plaintiff has been prevented from having so beneficial and healthy a use and occupation of the said lands and premises as he otherwise would have had, and the plaintiff's reversion in the said reversionary lands and premises was and is injured and affected in like manner and permanently depreciated in value. And the plaintiff was and is otherwise greatly injured and damnified." The declaration concluded by claiming £5,000.

Plea: Not guilty.

Issue.

On the trial, before MELLOR, J., at the Liverpool summer assizes in 1863, it appeared that the plaintiff was a cotton spinner at Wigan, who, in 1860 and 1861 became the owner by purchase of a mansion-house and about 1300 acres of land being parcel of an estate called the Bold Hall Estate, and resided there occasionally. The defendants are a joint stock company "limited," established under the Joint Stock Companies Acts, 1856, 1857, 1858, and incorporated on the 20th June, 1862. Some copper works of the defendants, called The Bold Copper Works, had been erected at a short distance from the property of the plaintiff before it was purchased by him, and the damage complained of was caused by the vapor sent forth by the chimney of those works. On some parts of the case there was considerable conflict of evidence.

The learned judge laid down the law to the jury thus: That every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless, by the lapse of a certain period of time, he has acquired a prescriptive right to do so. But that the law does not regard trifling inconveniences; everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property by noxious vapors arising on the land of another, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That, in determining that question, the time, locality, and all the circumstances should be taken into consideration; that in counties where great works have been

erected and carried on, which are the means of developing the national wealth, persons must not stand on extreme rights and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in those places. And he directed them to find accordingly.

The jury found for the plaintiff, damages £361 18*s.* 1½*d.*, adding, in answer to questions put by the learned judge at the request of the defendants' counsel: 1, that the enjoyment of the plaintiff's property was sensibly diminished; 2, that the business carried on by the defendants was an ordinary business for smelting copper, and conducted in a proper manner, in as good a manner as possible; and 3, that it was not carried on in a proper place.

EDWARD JAMES (HINDMARCH and WEBSTER with him) moved for a new trial, on the ground of misdirection. [MELLOR, J.— You wanted me at the trial to direct the jury according to the judgment of the Lord Chief Baron, in *Bamford* v. *Turnley*, 3 B. & S. 66, in the Exchequer Chamber, but I directed them in accordance with that of the majority of the court in that case.] The learned judge ought to have directed the attention of the jury to the circumstances of the case.

First. The plaintiff came to the nuisance, which, although not in itself an answer to the action, still forms an element in the question.

Secondly. The nature of the plaintiff's enjoyment of his property. An action of nuisance brought by a person in respect of land enjoyed by himself and his family for centuries rests on a different foundation from one brought by a person who has only recently acquired land.

Thirdly. The action was brought for an act of nuisance in a place where works beneficial to the public were common; there the right to maintain such actions would enable any private individual to put down the works of a whole locality.

Fourthly. The advantage probably resulting to the plaintiff's property from the vicinity of such works. *Bamford* v. *Turnley*, 3 B. & S. 66, is not at variance with this; and if it were, the language of the judges in *Carey* v. *Ledbitter*, 13 C. B. N. S. 470, intimates that the grounds of the decision of the Exchequer Chamber in that case have been misapprehended. [COCKBURN, C. J.— I thought *Hole* v. *Barlow*, 4 C. B. N. S.

334, was overruled by that decision.] The judges of the Common Pleas doubted that. ERLE, C. J., in delivering his judgment, says, p. 476: "The learned judge directed the jury to find for the plaintiff, if there was annoyance to a substantive degree; and he refused to ask them whether the bricks had been burned in a convenient place; and the question for us is, whether this refusal was a misdirection. My answer is in the negative, it having been decided in *Bamford* v. *Turnley* that to put such a question was a misdirection. And as a similar question is assumed to have been left to the jury in *Hole* v. *Barlow*, it follows that there was a similar misdirection in that case also in the same respect. But beyond deciding that the form of question adopted in this case was wrong, the judgment in the Exchequer Chamber does not extend. In the present case, if the objection had been that the learned judge told the jury to consider solely the evidence adduced to show discomfort to the plaintiff, and not to take into their consideration, in whole or in part, any evidence showing that the act complained of was an act of ownership on the part of the defendant, which was clearly lawful if it did not cause actionable discomfort to a neighbor, and was done with full attention to prevent discomfort in respect of time and place and manner and degree, I think that a misdirection would be made out. It seems to me that the affairs of life in a dense neighborhood can not be carried on without mutual sacrifices of comfort; and that, in all actions for discomfort, the law must regard the principle of mutual adjustment; and the notion that the degree of discomfort which might sustain an action under some circumstances must therefore do so under all circumstances, is as untenable as the notion that if the act complained of was done in a convenient time and place it must therefore be justified, whatever was the degree of annoyance that was occasioned thereby. I would add that the judgment of Willes, J., in *Hole* v. *Barlow*, appears to me sound, although the question left by Byles, J., has been decided to be wrong." And Byles, J., in the same case, p. 478, does not seem disposed to acknowledge that his ruling in *Hole* v. *Barlow*, was incorrect. His direction in that case was, p. 335: "No action lies for the use, the reasonable use, of a lawful trade in a convenient and proper place, even though some one

may suffer annoyance from its being so carried on," and the Court of Common Pleas affirms that ruling.

[MELLOR, J.—In a case at Leicester, before Willes, J., in which I was counsel, he said that some expressions are attributed to him in *Hole* v. *Barlow*, 4 C. B. N. S. 334, which he did not use. COCKBURN, C. J.—Is *Bamford* v. *Turnley*, 3 B. & S. 66, going to the House of Lords?] It is believed not. In *The Wanstead Board of Health*, v. *Hill*, 13 Com. B. N. S. 479, immediately succeeding the former case, it was held that brick burning is not necessarily a noxious or offensive business, trade or manufacture, within the Public Health Act, 1848, 11 and 12 Vict. c. 63. In delivering his judgment Willes, J., says, p. 484: "The case of *Hole* v. *Barlow*, I may observe, has been misunderstood. The judgment of at least one of the judges in that case proceeded on the ground that a man's enjoyment of his own property is necessarily in some degree subservient to the general good of the public. It is still, I apprehend, an open question, which must one day be determined by the highest tribunal, whether one who carries on a business under reasonable circumstances of place, time, and otherwise, can be said to be guilty of an actionable nuisance. According to Chief Baron Comyns and *Hole* v. *Barlow* he may; according to some of the judges in the Exchequer Chamber he may not. I do not pretend to offer an opinion upon a subject which has been considered doubtful by so many superior intellects." [COCKBURN, C. J. —What he meant there was, that the question must be taken to the highest tribunal—not that it is an open question of law. BLACKBURN, J.—We must go according to the decision of the Exchequer Chamber in *Bamford* v. *Turnley*, whatever might be said of that case in a court having jurisdiction to review it.]

COCKBURN, C. J.—There ought to be no rule. The direction of my brother Mellor can not be found fault with, if looked at by the light of the decision of the majority of the judges of the Exchequer Chamber in *Bamford* v. *Turnley*. That decision overruled the previous one of the Common Pleas in *Hole* v. *Barlow*, and establishes that, where a case of nuisance is sought to be made out, it is not a right question to put to the

jury to say whether the place where the act was done was a proper and convenient one for the purpose, or whether the doing it in that place was a reasonable use, by the defendant, of his own land. And if that question is to be excluded with respect to the relative positions of the plaintiff and defendant, as private individuals, it is likewise inconsistent with sound reason to say that the matter can be considered with reference to the interest of the public. It is new to me to hear that without compensation an individual is precluded from redress for private injury, on account of a benefit to the public arising from that injury. If that is an answer in the case of B, it will likewise be so in those of C, D, E, and so on. That appears to me to be getting out of the decision of the Exchequer Chamber in *Bamford* v. *Turnley*. On that decision I express no opinion. I am bound by it and must act on it.

For the present purpose it is only necessary to say that according to the decision in that case the summing up of my brother Mellor was right; and if it was wrong in any respect, the error is one of which the other side is the only party entitled to complain. But as the question is of the greatest importance, we will give Mr. James leave to appeal.

WIGHTMAN, BLACKBURN and MELLOR, JJ., concurring.

Rule refused.

TIPPING v. THE ST. HELEN'S SMELTING CO.

(4 Best & Smith, 616. In the Exchequer Chamber, 1863.)

For head-note see 11 M. R. 43.

The defendants having appealed against the above decision, EDWARD JAMES (HINDMARCH and WEBSTER with him), for the defendant, repeated his argument in the court below, and cited *Barwell* v. *Brooks*, *coram* Shadwell, V. C.

MELLISH (with whom were BRETT and MILWARD), for the plaintiff, was not called on.

The court, consisting of ERLE, C. J., POLLOCK, C. B., and CHANNELL, B.

Byles and Keating (Judges), Bramwell and Pigott (Barons), having left the court before the conclusion of the argument, held, that no misdirection appeared in the charge of Mellor, J., and consequently the judgment of the court below must be affirmed; Pollock, C. B., observing that although he had expressed a different opinion in *Bamford* v. *Turnley*, 3 B. & S. 66, he felt himself *in this court* bound by the judgment of the majority of its members on that occasion.

Judgment affirmed.

ST. HELEN'S SMELTING CO. v. TIPPING.

(11 H. L. C. 642. House of Lords, 1865.)

Distinction between nuisance affecting the person and nuisance affecting property. There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around him; as to the former the same rule would not apply.

Locality devoted to noisome trades. Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages, in respect of injury created by it to property in the neighborhood.

"Convenient" place. A place where the works of one person are carried on which occasion an actionable injury to the property of another, is not within the meaning of the law, "a convenient" place.

[1] **Trifling inconvenience no nuisance.** A bought an estate in a neighborhood where many manufacturing works were carried on. Among others there were the works of a copper smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapors from these works when they were in operation were proved to be injurious to the trees on A's estate. At the trial the judge told the jury that unless by a prescriptive right, every man must so use his own property as not to injure that of his neighbor; but that the law did not regard trifling inconveniences; everything

[1] *City of Denver* v. *Mullen*, 7 Colo. 345; *Gaunt* v. *Flynney*, L. R. 8 Ch. 8; *Salvin* v. *North B. Coal Co.*, 9 Id. 705; *Scott* v. *Firth*, 4 F. & F. 349.

must be looked at from a reasonable point of view, and therefore in the case of an alleged injury to property, as from noxious vapors from a manufactory, the injury to be actionable must be such as visibly to diminish the value of the property; that locality, and all other circumstances must be taken into consideration, and that in counties where great works have been and were carried on, parties must not stand on extreme rights: *Held*, that the direction was right.

This was an action brought by the plaintiff to recover from the defendants damages for injuries done to his trees and crops by their works. The defendants are the directors and shareholders of the St. Helen's Copper Smelting Company, Limited. The plaintiff, in 1860, purchased a large portion of the Bold Hall estate, consisting of the manor house and about 1,300 acres of land, within a short distance of which stood the works of the defendants. The declaration alleged that, "the defendants erected, used, and continued to use certain smelting works upon land near to the said dwelling house and lands of the plaintiff, and caused large quantities of noxious gases, vapors and other noxious matter to issue from the said works, and diffuse themselves over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit and herbage were greatly injured, the cattle were rendered unhealthy and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed, and also the reversionary lands and premises were depreciated in value." The defendants pleaded not guilty.

The cause was tried before Mr. Justice Mellor, at Liverpool, in August, 1863, when the plaintiff was examined and spoke distinctly to the damage done to his plantations, and to the very unpleasant nature of the vapor, which, when the wind was in a particular direction, affected persons as well as plants in his grounds. On cross-examination he said he had seen the defendants' chimney before he purchased the estate, but he was not aware whether the works were then in operation. On the part of the defendants, evidence was called to show that the whole neighborhood was studded with manufactories and tall chimneys; that there were some alkali works close by the defendants' works; that the smoke from one was quite as injurious as the smoke from the other; that the smoke of both sometimes united, and that it was impossible to say to which of the two any particular injury was attributable. The fact

that the defendants' works existed before the plaintiff bought the property was also relied on.

The learned judge told the jury that an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in a such a manner as not to injure the property of his neighbors; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and, therefore, in an action for nuisance to property, arising from noxious vapors, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for, if so, the business of the whole country would be seriously interfered with.

The defendants' counsel submitted that the three questions which ought to be left to the jury were, "whether it was a necessary trade; whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner." The learned judge did not put the questions in this form, but did ask the jury whether the enjoyment of the plaintiff's property was sensibly diminished, and the answer was in the affirmative; whether the business there carried on was an ordinary business for smelting copper, and the answer was, "We consider it an ordinary business and conducted in a proper manner—in as good a manner as possible." But to the question whether the jurors thought that it was carried on in a proper place, the answer was, "We do not." The verdict was therefore entered for the plaintiff, and the damages were assessed at £361, 18*s.* 4½*d.*

A motion was made for a new trial on the ground of misdirection, but the rule was refused: 4 Best & S. 608. Leave was however given to appeal, and the case was carried to the Exchequer Chamber, where the judgment was affirmed—Lord

Chief Baron Pollock there observing, "My opinion has not always been that which it is now. Acting upon what has been decided in this court, my brother Mellor's direction is not open to a bill of exception." 4 Best & S. 616. This appeal was then brought.

The judges were summoned and Mr. Baron Martin, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Baron Pigott, and Mr. Justice Shee attended.

The Attorney General (Sir R. PALMER) and Mr. WEBSTER, for the appellants (defendants in the court below).

Mr. BRETT, Mr. MELLISH and Mr. MILWARD were for the respondents, but were not called upon to address the house.

The Lord Chancellor (Lord WESTBURY). My lords, as your lordships, as well as myself, have listened carefully to the able argument on the part of the appellants and are perfectly satisfied with the decision of the court below, and are of opinion that, subject to what we may hear from the learned judges, the direction to the jury was right, I would submit that two questions should be put to the learned judges; but, at the same time, the learned judges will be good enough to understand that if they desire further argument of the case the respondents' counsel must be heard. Otherwise the following are the questions which I propose to put to them: whether directions given by the learned judge at *nisi prius* to the jury were correct; or, whether a new trial ought to be granted in this case. The learned judges will intimate to your lordships whether they desire to hear further argument on the part of the respondents' counsel, or whether they are prepared to answer the questions put to them by your lordships.

Mr. Baron Martin said that the judges did not require the case to be further argued, but they requested to have a few moments' consideration to give their answer to the questions put to them.

Adjourned for a short time, and resumed.

Mr. BARON MARTIN.—My lords, in answer to the questions proposed by your lordships to the judges, I have to state their unanimous opinion that the directions given by the learned

judge to the jury were correct, and that a new trial ought not to be granted. As far as the experience of all of us goes, the directions are such as we have given in these cases for the last twenty years.

JULY 5TH.

The LORD CHANCELLOR.—My lords, I think your lordships will be satisfied with the answer we have received from the learned judges to the questions put by this house.

My lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself, individually, there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Now, in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper-smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began on the property of the present appellants, in their works at St. Helen's. Of the effect of the vapors exhaling from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence in the case.

My lords, the action has been brought upon that, and the jurors have found the existence of the injury; and the only ground upon which your lordships are asked to set aside that verdict and to direct a new trial is this, that the whole neighborhood where these copper-smelting works were carried on is a neighborhood more or less devoted to manufacturing purposes of a similar kind; and therefore it is said, that inasmuch as this copper-smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My lords, I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably can not carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property. Of course, my lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place.

On these grounds, therefore, shortly, without dilating further upon them, (and they are sufficiently unfolded by the judgment of the learned judges in the court below,) I advise your lordships to affirm the decision of the court below, and to refuse the new trial, and to dismiss the appeal with costs.

LORD CRANWORTH.—My lords, I entirely concur in opinion with my noble and learned friend on the woolsack, and also in the opinion expressed by the learned judges, that this has

been considered to be the proper mode of directing a jury, as Mr. Baron Martin said, for at least twenty years. I believe I should have carried it back rather further. In stating what I always understood the proper question to be, I can not do better than adopt the language of Mr. Justice Mellor. He says, "It must be plain that persons using a limekiln, or other works which emit noxious vapors, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." I always understood that to be so; but in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property.

I perfectly well remember, when I had the honor of being one of the barons of the Court of Exchequer, trying a case in the county of Durham, where there was an action for injury arising from smoke, in the town of Shields. It was proved incontestably that smoke did come and in some degree interfere with a certain person; but I said, "you must look at it, not with a view to the question whether, abstractly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields," because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance.

There is nothing of that sort, however, in the present case. It seems to me that the distinction, in matters of fact, was most correctly pointed out by Mr. Justice Mellor, and I do not think he could possibly have stated the law, either abstractly or with reference to the facts, better than he has done in this case.

LORD WENSLEYDALE.—My lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think everything is included: The defendants say, "If you do not mind you will stop the progress of works of this description." I agree that it is so because, no doubt in

the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, "I will bring an action against you for this and that, and so on." Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value, of the property which is affected.

My lords, I do not think the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Judgment of the Exchequer Chamber affirming the judgment of the Court of Queen's Bench, affirmed, and appeal dismissed with costs.

TIPPING v. ST. HELEN'S SMELTING CO.

(L. R. 1 Ch. App. 66. Court of Appeal in Chancery, 1865.)

[1] **Smelting works enjoined—[2] Rule of "coming to a nuisance" not applied.** H. sold land to persons who were described in the conveyances as copper smelters and copartners, and as purchasing for the purposes of the partnership; and who, between the contract and conveyance, nearly completed smelting works on the lands. H. subsequently sold neighboring land to the plaintiff, who bought with full notice of the existence of the copper works. The plaintiff recovered judgment at law, with substantial damages, for injury done to this land by the smoke of the works, and then filed his bill for an injunction. Wood, V. C., held that the plaintiff's having come to the nuisance did not disentitle him to equitable relief, and that H.'s having sold the site of the works with full knowledge that such works would be erected on it, did not disentitle him or those claiming under him to complain of any nuisance which the works might occasion. And his Honor granted an interlocutory injunction. *Held*, on appeal, that the injunction had been rightly granted.

This was a motion by way of appeal from an order of Vice Chancellor Wood, granting an interlocutory injunction to re

[1] *Robinson* v. *Baugh*, 31 Mich. 290.

[2] See *Edwards* v. *Allouez M. Co.*, 7 M. R. 577.

strain the defendants from injuring the plaintiff's land by the smoke from their works.

In August, 1859, part of the estate of Sir Henry de Hoghton, near St. Helen's, was put up for sale in lots. A Mr. Critchley bought at the sale one of the lots, being the land on which the defendants' works were afterward erected. He bought it for the purpose of copper works, obtained immediate possession, and immediately commenced erecting copper works, which were nearly completed before the 14th of March, 1860, on which day the purchase was completed. The conveyance was made to Lord Alfred Paget, Mr. Critchley, and another, described therein as partners and copper smelters, and it was recited that the purchase had been made on behalf of the partners and for the purposes of the partnership.

In July, 1860, Sir Henry de Hoghton put up for sale other parts of his property, including Bold Hall and the park belonging to it. The plaintiff became the purchaser. It was admitted by the plaintiff, that when he entered into the contract he had seen a large chimney which formed part of the works now belonging to the defendants and was aware that it belonged to copper works.

It was in evidence that there were already many chemical works in the neighborhood of St. Helen's, emitting a large quantity of deleterious vapor, but it did not clearly appear that the plaintiff's property had ever sustained any appreciable injury from them.

In 1861 a company was projected for the purpose of carrying on the copper works above mentioned. The plaintiff had already perceived that injury was done to his trees by the smoke, and understanding that the company would carry on the works on a larger scale, he entered into communication with the promoters. The company was incorporated in June, 1862, and after some correspondence—no arrangement being come to—the plaintiff, in July, 1863, commenced an action against the company. The company pleaded not guilty, and on the 27th of August, 1863, a verdict was found for the plaintiff, with £360 damages. In November, 1863, an application for a new trial was refused by the Court of Queen's Bench. In November, 1864, this decision was affirmed by the Exchequer Chamber, and on the 5th of July, 1865, by the House of Lords.

The plaintiff then, on the 10th of July, 1865, filed his bill to restrain the defendants from using their works so as to injure his estate, and for an account of damage since the time up to which damages had been obtained at law.

An injunction was moved for before Vice Chancellor Wood. His Honor held that the fact of the plaintiff having come to the nuisance, did not disentitle him to the aid of a court of equity. As regarded the site of the works having been purchased from the same vendor for the purpose of erecting copper works, and before the purchase by the plaintiff, his Honor considered that the case was not the same as if the vendor had erected copper works and sold them to the defendants, and that his selling the land with the knowledge that the purchasers intended to erect copper works upon it, did not debar him, or those claiming under him, from complaining of any nuisance that might arise therefrom to the other parts of his property. With respect to an allegation, supported to some extent by evidence, that the existence of the copper works was mentioned during the negotiations between the plaintiff and Sir Henry de Hoghton, and produced an abatement in the price, his Honor considered that the existence of a nuisance, though liable to be suppressed by legal proceedings, was a fair ground for an abatement of price, and that it could not be inferred from the fact of such abatement having been made, that the purchasers had agreed to give up the right to complain of the nuisance. His Honor accordingly granted an injunction, which the defendants now moved to discharge.

The Attorney General (SIR R. PALMER), Mr. GIFFARD, Q, C., and Mr. JACKSON, for the appellants.

Mr. ROLT, Q. C., and Mr. EDDIS, for the plaintiff, were not called upon.

SIR J. L. KNIGHT BRUCE, L. J.

A judgment at law has been obtained by the plaintiff against the defendants, for a nuisance affecting his real estate, and substantial damages have been given. It is almost of course that in this state of circumstances a court of equity

should grant an injunction to prevent the continuance of the nuisance, and I have heard no argument against it to which, consistently with the established rules, practice, and doctrine of this court, any weight can be given. The cause has not been heard, and the defendants will have an opportunity of urging at the hearing any reasons why the injunction should not be made perpetual; but as matters now stand, I think that the course taken by the vice chancellor was clearly right, and that the appeal motion ought to be refused with costs.

SIR G. J. TURNER, L. J.—I agree.

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[1]SANDERSON ET UX. V. THE PENNSYLVANIA COAL CO.

(86 Pennsylvania State, 401. Supreme Court, 1878.)

[2]**Polluting stream by coal mining—Sufficient cause of action.** S. purchased a tract of land in the coal regions, upon which he erected a handsome residence. One of the principal inducements to the purchase was that a stream of pure mountain water ran through the tract, and a number of valuable improvements were made in order that the residence and grounds might be supplied with water for culinary, bathing and other purposes. Shortly after these improvements were completed a mine was opened by defendant on the stream about two miles above, the water from which when pumped or flowing naturally therefrom ran into the stream and so polluted it as to render the water unfit for any of the uses to which S. had adapted it. Upon the above facts the court below entered a nonsuit, on the ground that in the absence of negligence or malice this was *damnum absque injuria: Held*, that S. had a right of action and the case should have been submitted to a jury.

[3]**Idem—The exigencies, however, of the great industrial interests must be kept standing in view.** The properties of large and useful interests should not be hampered or hindered for frivolous or trifling causes. For slight inconveniences or occasional annoyances they ought not to be held responsible, and in dealing with such complaints, juries should be held with a steady hand.

Error to the Court of Common Pleas of Luzerne County.

Trespass on the case by J. Gardner Sanderson and wife, in right of the wife, against the Pennsylvania Coal Company, for damages for the alleged corruption of a stream by reason of the working of the colliery of defendants.

[1] S. C. on second appeal, 11 M. R. 79.

[2] *Robinson* v. *Black Diamond Co.*, 14 M. R. —; *Bell* v. *Shultz*, 14 M. R. —.

[3] *Tipping* v. *St. Helen's Co.*, 11 M. R. 43.

In 1868 the plaintiffs purchased a tract of land which is within the limits of the city of Scranton, on which they erected a handsome residence and other valuable improvements. A stream of water called "Meadow Brook," runs through this tract, and before its purchase Mr. Sanderson traced it to its source, and it appeared that the existence of this stream was one of the principal inducements to the purchase of the land. This stream was about an average width from its source to the house of plaintiffs. When traced by Mr. Sanderson the water was perfectly pure. Dams were built across the stream for the purpose of fish and ice ponds and to supply a cistern, and the water was carried in pipes from the cistern to a ram and thence forced to a tank in the attic of the house. After these improvements had been made the defendants opened a coal mine on the side of a hill about three miles above the house of plaintiffs. A drift was first made into this mine, and a shaft afterward sunk. The water which collected in this drift, as well as that pumped by engines from the shaft, ran into the creek. The water from the drift, following the law of gravitation, naturally flowed into the stream. It was shown that the effect of this was that the water of the stream was so corrupted that the fish in the pond were destroyed; that the willows along the bank died; that the pipes carrying the water were corroded and eaten out; that the water was unfit for domestic use, and that finally its use had to be abandoned for every purpose. No analysis was furnished of the water, but it was conceded that it was acid and unfit for use, although unchanged in appearance. It appeared that mine water is usually impregnated with acid. Upon the above facts the court, STANTON, J., entered a compulsory nonsuit, on the ground that there appeared to be no negligence or malice, and the discharge of the mine water being necessary in mining, was *damnum absque injuria.*

The action was assigned for error by plaintiffs, who took this writ.

A. RICKETTS, for plaintiffs in error.

HENRY M. HOYT and ANDREW T. MCCLINTOCK, for defendants in error.

WOODWARD, J., delivered the opinion of the court.

In the year 1868 the plaintiffs purchased a tract of land in the city of Scranton, and began the erection of a house upon it, which was finished in the year 1870. Before the purchase a stream of water which ran through the land was examined by Mr. Sanderson, who traced it to its source. It appears from his testimony that the existence of this stream was a leading inducement to the plaintiffs to buy and build. It was called by some of the witnesses Meadow Brook, and was of an average width of perhaps seven feet throughout the distance from the house of the plaintiffs to the springs from which it flowed. Mr. Sanderson testified that when he traced it, in 1868, the water was perfectly pure. Dams were built across it for the purposes of a fish and ice pond, and to supply a cistern. Water was carried in pipes from the cistern to a ram, and thence to a tank in the attic of the house.

After the improvements were completed the defendants established a colliery on lands belonging to them along the stream, and about two miles above the land of the plaintiff. A drift was first made into their mine, and a shaft was afterward sunk. The water which collected in the drift, as well as that pumped by powerful engines from the shaft, ran into Meadow Brook, and was carried to its outlet in the Lackawanna river. It was alleged on the trial that the effect of the mine water was to corrupt the water of the stream, and to render it worse than worthless for any domestic or household use. There was evidence that the fish in the brook were destroyed; that the willows along the banks died; that the pipes connecting it with the cistern, the ram and the house, were corroded and eaten out; that the water became unfit for domestic uses as early as 1873; and that its use for all purposes was abandoned in 1875. After the evidence of the plaintiffs had been given, it was held by the court to be inadequate to warrant or support a verdict, and a nonsuit was directed.

In the summary disposition that was made of the cause, sight appears to have been lost of some distinctions which the law has settled, and a mistake seems to have been made in choosing the class of precedents that were followed. The water in the mine of the defendants was in the ground before

the colliery existed, but the drift and shaft collected it in such volume, and the mining operations made its ejection necessary in such a direction as to render what was harmless in its natural state a source of material discomfort, mischief and disaster. Undoubtedly the defendants were engaged in a perfectly lawful business, in which large expenditures had been made, and with which widespread interests were connected. But however laudable an industry may be, its managers are still subject to the rule that their property can not be so used as to inflict injury on the property of their neighbors. "Every man," Lord Truro observed, in *Egerton* v. *Earl Brownlow*, 4 H. L. C. 195, "is restricted against using his property to the prejudice of others." The invasion of an established right will in general, *per se*, constitute an injury for which damages are recoverable, for in all civil acts the intent of the actor is less regarded than the consequences to the party suffering. Thus, if a man lop a tree, and the boughs, *ipso invito*, fall upon another, or he shoot at a butt, and hit another unawares, an action lies. So, one is liable who has land through which a river runs to turn his neighbor's mill, and lops the trees growing on the river side, and the loppings impede the progress of the stream, which hinders the mill from working: Broom's Leg. Max. 366, 367. To render a particular case an exception to the general principles controlling the exercise of dominion over property by its proprietor, it must be ascertained to be exceptional in its surroundings or its facts. From necessity the principles are sometimes relaxed. They do not apply where it is impossible to gather safe facts to become bases for safe rules. With respect to water flowing in a subterraneous course, it has been held that the owner of land through which it flows has no right or interest which will enable him to maintain an action against an owner who, in carrying on mining operations in his own land, in the usual manner, drains away the water from the other's land, and lays his well dry. *Acton* v. *Blundell*, 12 M. & W. 324, *Haldeman* v. *Bruckhart*, 9 Wright, 514, and *Wheatley* v. *Baugh*, 1 Casey, 528, were ruled in the same way. So, rights and liabilities in respect of artificial streams, when first flowing on the surface, are in some particulars distinct from those respecting natural streams so flowing. They are distinct at least to the extent that the user

of the easement of sending on the water of an artificial stream to the land of a neighbor, is no evidence that the land from which the water is sent has become subject to the servitude of being bound to send it on: *Gaved* v. *Martyn*, 19 C. B. N. S. 758. Perhaps *Smith* v. *Kenrick*, 7 C. B. 515, may be classed as an exceptional case also in its circumstances, although as a precedent it will probably prove of doubtful value. It was held there that each of two owners of adjoining mines has a natural right to work his own mine in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine.

But except where it is qualified by the existence of peculiar conditions, the duty of the owner of property is defined by the maxim *sic utere tuo ut alienum non lædas.* Can it be said, as a conclusion of law, that the duty of these defendants is qualified by such conditions? They created an artifical watercourse from their mine to Meadow Brook. The plaintiffs insisted that the act resulted in grave injury to them. Why ought not the jury to have been left to determine the truth or falsity of their allegation? It was declared in *Gaved* v. *Martyn*, *supra*, that if the water in an artificial stream when brought to the surface is made to flow on the land of a neighbor without his consent, it is a wrong for which the party causing it so to flow is liable. If a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his own peril, and is liable for the consequences if it escapes and does injury to another: *Jones* v. *Festiniog*, L. R., 3 Q. B. 736. "The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir (*Harrison* v. *Great North Western Railroad Co.*, 3 H. & C. 238), or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works (*St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642), is damnified without any fault of his own, and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it was confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged

to make good the damage which ensues if he does not succeed in confining it to his own property." *Fletcher* v. *Rylands*, L. R., 1 Ex. 280. In an elaborate and carefully considered opinion in *Mason* v. *Hill*, 5 B. & Ad. 1, Denman, C. J., held that the possessor of land through which a natural stream runs, has the right to the advantage of that stream flowing in its natural course, not inconsistent with a similar right in the proprietors of the land above and below; and that neither can any proprietor above diminish the quantity or injure the quality of the water, nor can any proprietor below throw back the water without his license or grant. It was one of the features of that case that the water which the defendant had the right to use, subject to the duty of returning it, was heated when it was returned to the stream, and the jury had assessed damages for that. The chief justice said in entering judgment: "As to the right to recover for the injury sustained by the water being returned in a heated state, there can be no question." In *Wood* v. *Sutcliffe*, 16 Jur. 75, and 8 Eng. L. & Eq. R. 217, an injunction was granted to restrain the defendant, against whom a recovery had been had at law, from pouring dye-wares, dye-liquors, madder, indigo or potash into a channel that connected his dye works with a stream called the "Bowling Beck," on which, below the works, the cotton mill of the plaintiffs was situated, and in the use of the water of which they claimed prescriptive rights. "I am satisfied from the evidence," the vice chancellor remarked in the course of his opinion, "that to some considerable extent, the pollution of this stream is inevitable, and that no court of law, or court of equity, nor all the courts in the world, except there were a power of removing all that mass of human beings which now congregate about its banks, ever could restore it to the state in which it once was. But still it does not follow, because there be a certain degree of pollution which can not be very accurately measured and which is inevitable, that therefore everybody has a right to pollute the stream by pouring in immense quantities of filth and pollution from his own works, to make it ten thousand times worse." *Pennington* v. *Brinksop Hall Coal Co.*, 5 Ch. Div. 769, was a case where an injunction was granted to restrain the defendants from pumping water from their colliery

into Borsdane Brook, by which the water in use for the cotton mill of the plaintiffs had been corrupted. While their claim included the assertion of a prescriptive right it was discussed mainly in view of the position of plaintiffs as sub-riparian owners, by the justice who granted the injunction. In answer to the suggestion that in lieu of the remedy sought damages should be awarded, it was said that "the rights of the plaintiffs as riparian owners are not limited to their present modes of enjoyment. It was impossible to foresee what modes they, or their successors in title, may resort to, or the extent of damages which would be compensation for the injury which the continued pollution might cause to such new modes of enjoyment." While a right by prescription was the main element of the title of the plaintiffs to a decree in *Wood* v. *Sutliffe*, and a partial element in the title of the plaintiffs in *Pennington* v. *Brinksop Hall Coal Co.*, it did not enter at all into the consideration of *Mason* v. *Hill*. There, indeed, it was expressly put aside. "We do not wish," the chief justice declared, "to rest a judgment for the plaintiff on this narrow ground." *Pennington* v. *The Coal Co.* was decided so lately as last May, and it would seem that in England this branch of the law has been definitely and firmly settled.

And the question is by no means a fresh one in Pennsylvania. In *Barclay* v. *Com.*, 1 Casey, 503, the defendant had been convicted of a nuisance in the Quarter Sessions of Bedford, in permitting the wash and waste from his barnyard to escape into the springs dedicated by the Penns to the use and benefit of the inhabitants of the town of Bedford. In this court the judgement was reversed for an irregularity in the sentence, but the conviction was approved. *The Little Schuylkill Nav. Co.* v. *Richards* (10 M. R. 661), was an action to recover damages for injury to the plaintiff's forge dam in the Little Schuylkill river, caused by the throwing of coal-dirt, slate and loose earths into the channel of the stream by the servants and employes of the defendants. The refuse matter was carried down the river by the action of the water, and deposited in the dam. Other persons were shown to have cast the refuse of their mines into the water, and the court below had charged in substance that the defendants were liable for the combined results of all the deposits. This instruction raised

the main question on the writ of error. It was held here that the liability of the defendants began with their act on their own land, and was wholly separate and independent of concert with others; and that their tort, having been several when committed, did not become joint because its consequences united with the consequences of the acts of others. But it was not suggested that under any theory or doctrine of public policy the defendants had the right to use the river bed as a dumping ground for the rubbish of their mines. The corruption of the water was not alleged, it is true, but it is not readily apparent how a principle could be sound that would justify the destruction of the water of a running stream for one purpose, and not justify the destruction of its uses by the same or a similar agency for all purposes whatever.

In the argument here, the ground was distinctly taken that immense public and private interests demand that the right which the defendants exercised in ejecting the water from their mine should have recognition and be established. It was said that in more than a thousand collieries in the anthracite regions of the State, the mining of coal can only be carried on by pumping out the percolating water which accumulates in every tunnel, slope and shaft, and which, when brought to the surface, must find its way by a natural flow to some surface stream. It was urged that the law should be adjusted to the exigencies of the great industrial interests of the commonwealth, and that the production of an indispensable mineral, reaching to the annual extent of twenty millions of tons, should not be crippled and endangered by adopting a rule that would make colliers answerable in damages for corrupting a stream into which mine water would naturally run. These are considerations that are entitled to be well weighed. In the trial of questions like this before a jury, they ought to be kept steadily in view. The proprietors of large and useful interests should not be hampered or hindered for frivolous or trifling causes. For slight inconveniences or occasional annoyances they ought not to be held responsible, and in dealing with such complaints juries should be held with a steady hand. Only when some material and appreciable injury has been sustained should a recovery of damages against them be allowed. But there must be one rule of law maintained for

all men, and by that rule all men's rights must be tried and tested. The view so earnestly and ably presented by the counsel here was pressed upon Mr. Justice Mellor, in the trial of *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cases 642—a precedent in every way of interest and value. After the verdict, a motion for a new trial was heard and refused by the Court of Queen's Bench, and on review in the Exchequer Chamber, and afterward in the House of Lords, the judgment was affirmed. In charging the jury, the judge used this language: "The defendants say, 'If you do not mind, you will stop the progress of works of this description.' I agree that it is so, because, no doubt, in the county of Lancaster, above all other counties where great works have been created and carried on—works which are the means of developing the national wealth—you must not stand on extreme rights, and allow a person to say, 'I will bring an action against you for this, that, and so on.' Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards essential inconveniences; injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected." In another part of the same lucid charge the jury were instructed that, "if a man by any act, either by the erection of a lime kiln, or copper works, or any work of that description, sends over his neighbor's land that which is noxious and hurtful, to an extent which sensibly diminishes the comfort and value of the property, and the comfort of existence on that property, that is an actionable injury." The consequences that would flow from the adoption of the doctrine contended for, could be readily foretold. Relaxation of legal liabilities and remission of legal duties to meet the current needs of great business organizations in one direction, would logically be followed by the same relaxation and remission, on the same grounds, in all other directions. One invasion of individual right would follow another, and it might be only a question of time when, under the operations of even a single colliery, a whole country side would be depopulated.

Judgment reversed and procedendo awarded.

PAXSON, J., filed a dissenting opinion.

JAMES CRANE ET AL., Appellants, v. W. E. WINSOR AND FRANK RANDALL, Respondents.

(2 Utah, 248. Supreme Court, 1878.)

[1] **The owners of a water ditch are entitled to have the water flow therein in its natural state,** and when they claim such water by prior appropriation its corruption by any stranger is a private nuisance.

Equitable interference. Equity will restrain the continuance of a private nuisance at the suit of the sufferer.

Pleading in such case. Complaint in case at bar commented on and held sufficient.

Appeal from the Third Judicial District Court.

The complaint, omitting the formal parts, was as follows:

Plaintiffs allege that at the time of the earliest settlement made in Salt Lake county, Utah Territory, A. D. 1847, there was and still is a well defined stream of water known and designated as Butterfield Creek, flowing from a canyon in the mountains, situated at and near to the southwest corner of Great Salt Lake Valley, in Salt Lake county, Utah, and flowing northeast down said canyon (Butterfield canyon) a distance of eight or ten miles or more.

That in 1851 a settlement known as Herriman's Fort, was made, and it is situated on what was then the public lands of the United States, which, on the survey of the United States being made, proved to be in township 3 south, range 2 west, and a little northeast of the mouth of said canyon in Great Salt Lake Valley, Salt Lake county, Utah; which said settlement was and now is on land that with irrigation is good and productive, but without irrigation is neither good nor productive, and in a country surrounded with grazing lands suited to the keeping of all kinds of domestic animals.

That the said settlement has been in continuous existence ever since the year 1851, and is now in existence. That it consists of some two hundred and fifty persons in the aggregate, some forty of whom are the heads of families. That these heads of families own and occupy farms and gardens under

[1] *Bear River Co.* v. *New York Co.*, 4 M. R. 526.

cultivation (there being dwellings and out houses) and own stock; which said farms, gardens, stock and inhabitants are sufficient to use all the water flowing from said canyon.

That these plaintiffs respectively are residents of said settlement, and have been such residents for more than twelve years last past; own and cultivate farms and gardens; own and occupy dwellings, there being; own stock there kept for use, and are the heads of families there living. That they are, in connection with the other heads of families, the owners of the water flowing in said creek, and for more than twelve years last past have had a common interest and right in and to said water, in connection with the other settlers, residents and inhabitants of said settlement.

That in the year 1851 the settlers in said settlement, by mutual consent and pursuant to the customs of the country at that time prevailing, constructed a water ditch from said stream to said settlement, a distance of about four miles, sufficiently large to contain all the water flowing in said stream; turned the water there flowing into said ditch; brought it to said settlement and there appropriated it to their use, dividing the water equitably and as justly as they knew how among said settlers, and during the time which has since elapsed up to the unlawful and wrongful interruption hereinafter set forth, the plaintiffs and these settlers have without hindrance enjoyed the entire and exclusive use and benefit of said water in a pure state.

That on the 15th day of October, 1876, the said W. E. Winsor and Frank Randall unlawfully and wrongfully erected or caused to be erected on the banks of said stream and above said settlement, a machine or mill for crushing ore, called a crusher, and unlawfully and wrongfully commenced crushing ore therein. To do which they unlawfully and wrongfully took the water from said stream, against the consent of said settlers or any of them, and caused it to pass through said crusher when crushing ore, and afterward turned the water back into said stream, and from that time till the present they have continued to unlawfully and wrongfully use said water in the manner aforesaid, and threaten still to continue so to to do.

These plaintiffs say that the ore therein crushed as aforesaid contains large quantities of silver, lead and other minerals

and poisonous substances, and that in the process of crushing and milling said ores, various chemical poisons have been and are continually used, such as arsenic and other poisons, by said defendants; that in causing the water of said creek to pass through said mill or crusher when crushing the ore aforesaid, the lead and other mineral poisons therein contained and other poisonous substances used in milling said ores, enter into said water, are taken up by it and therein held in solution to an extent that said water became impure, unhealthy and dangerous to life, including the life of man, of animals and of vegetable life.

That the said defendants by using the said water as aforesaid and turning the same in its impure state into the stream, to flow down into and through said settlement, have erected a nuisance injurious to the health, offensive to the sense, which obstructs the full use and enjoyment of the property of the said settlers and these plaintiffs, annoys, injures and endangers their comfort, repose, health and safety, and renders them insecure in their lives and in the use of their property.

That there are no means by which said settlers can obtain water for any purpose whatever, except to use the water of said creek, and that in using the same since said defendants have erected said nuisance, a large amount of stock, the property of said settlers, has died by reason of its use; and which stock was of great value, to wit, four hundred dollars; also from its use one person has died.

These plaintiffs further say, that on the 27th day of January, 1877, the inhabitants of said settlement, at a meeting called for that purpose, passed a resolution authorizing and requesting these plaintiffs, in their own behalf and in behalf of said settlers, to take such measures as the law provides to cause said nuisance to be inquired into and abated, for the reason that these plaintiffs aver if the nuisance continue it will cause an irreparable injury to the farms, gardens and orchards of the said settlers, and produce an abandonment of their dwellings and break up their settlement.

The other facts appear in the opinion.

SNOW & SNOW, for appellants.

No brief on file for respondents.

EMERSON, J., delivered the opinion of the court.

The case comes to this court upon demurrer to the complaint which was sustained in the court below with leave to amend. The plaintiffs elected not to amend, and accordingly final judgment dismissing the complaint passed for the defendants.

The demurrer admits the facts as alleged in the complaint. From that it appears that the settlers of "Herriman's Fort," who authorized these plaintiffs to bring this suit in their behalf, many years ago constructed a ditch leading from Butterfield creek to said settlement, by means of which they appropriated all the water flowing in said creek, and that all the water is needed for agricultural and culinary purposes. That in 1876 the defendants erected, on the banks of said stream and above said settlement, an ore crusher, and commenced and still continue, and threaten to continue in the future, the business of crushing ore therewith. That in the prosecution of their said business they wrongfully and against the consent of said settlers take a portion of the water from said stream, and after passing it through their crusher, where it takes up and holds in solution certain chemical poisons contained in the ores, and other poisons used in its reduction, turn it back into the stream, where it mingles with the water flowing down to said settlement. That the water when it reaches the settlement is rendered so impure and poisonous as to be destructive of both animal and vegetable life. That by reason of its use in this impure state, one person had died, and a large amount of stock had been killed. The prayer, among other things, asks that the defendants be restrained from using the water in any manner inconsistent with the rights of said settlers, and for damages to be assessed.

The question is, does the complaint state such a case as entitles the plaintiffs to the relief asked, or any relief? Taking the statements of the complaint as true, we are of opinion that the plaintiffs are clearly entitled to their injunctive relief. They can not in this action recover damages for the destruction of property owned by them in severalty. The statement of the destruction of property and loss of life consequent upon the use of the water thus deteriorated in quality by the

defendants, may be regarded as surplusage, or as a mere evidence of fact going to show that the water was polluted to such an extent as to make it dangerous to life, and unfit for the uses for which it was appropriated.

The plaintiffs, as the owners or tenants in common of the water ditch and the water flowing therein, by virtue of their prior appropriation and the corruption of the water by the defendants, is a private nuisance. The right thus secured to the plaintiffs is to have the water flow to them in its natural state. If the use the defendants put the water to did not deteriorate it in quality, then the plaintiffs would have no right of action so long as the quantity was not materially changed. Suppose the defendants had diverted all or any considerable portion of the water flowing in this creek, there could be no doubt about the right of the plaintiffs to an injunction restraining the defendants from such diversion, upon a bill framed substantially like the one in this case. Taking the complaint as true, the injury to the plaintiffs is more serious than would arise from the mere diversion of the water, from its being rendered dangerous to human life. The rights acquired by the plaintiffs should be protected by the court.

The complaint, although inartificially drawn, sets out with sufficient clearness and certainty the character, or nature of the plaintiffs' claim; the character, nature and extent of the interference on the part of the defendants, and the character in which the plaintiffs sue. The injury complained of is to the common property of the plaintiffs, and constitutes a private nuisance. The demurrer should have been overruled.

The judgment of the court below is reversed and the cause remanded, with instructions to overrule the demurrer.

SCHAEFFER, C. J., and BOREMAN, J., concurred.

HEEG v. LICHT.

(80 New York, 579, 36 Am. Rep. 654. Court of Appeals, 1880.)

[1] **The keeping of a powder magazine** in a place where, in case of explosion, dwelling houses may be injured, may or may not amount to a private nuisance; that depends upon the locality, the quantity kept, and other circumstances.

Keeping gunpowder when a nuisance—Question for jury. In an action for injuries to plaintiff's buildings caused by the explosion of a powder magazine located near the buildings but beyond the territorial limits of a city, the court below charged the jury that they must find for the defendant, unless they found that the defendant carelessly and negligently kept the gunpowder upon his premises: *Held*, error. The fact that the magazine was liable to an explosion which could not be guarded against or averted by the greatest care, evinced its dangerous character, and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business, when free from negligence has no application. The question should have been left to the jury to determine whether under all the circumstances the defendant was chargeable with maintaining a private nuisance, and answerable for the damages arising from the explosion.

Appeal from the judgment of the general term of the Supreme Court in the Second Judicial Department, affirming a judgment in favor of defendant entered upon a verdict. (Reported below, 16 Hun, 257.)

This action was brought to recover damages for injuries to plaintiff's buildings, alleged to have been caused by the explosion of a powder magazine on the premises of defendant; also to restrain the defendant from manufacturing and storing upon his premises fireworks or other explosive substances.

The facts are sufficiently stated in the opinion.

PHILIP S. CROOKE, for appellant.

BENJAMIN F. DOWNING, for respondent.

MILLER, J.

[1] *Emory* v. *Hazard P. Co.*, 22 S. C. 476; 53 Am. R. 730; *White* v. *Colo. Cent. R.*, 5 Dill. 429; 3 McCr. 559; *Cheatham* v. *Shearon*, 1 Swan, 213; *Myers* v. *Malcolm*, 6 Hill, 292; 41 Am. Dec. 744; *McAndrews* v. *Collerd*, 42 N. J. L. 189; 36 Am. Rep. 508.

This action is sought to be maintained upon the ground that the manufacturing and storing of fire-works, and the use and keeping of materials of a dangerous and explosive character for that purpose, constituted a private nuisance, for which the defendant was liable to respond in damages, without regard to the question whether he was chargeable with carelessness or negligence. The defendant had constructed a powder magazine upon his premises, with the usual safeguards, in which he kept stored a quantity of powder, which, without any apparent cause, exploded and caused the injury complained of. The judge upon the trial charged the jury that they must find for the defendant, unless they found that the defendant carelessly and negligently kept the gunpowder upon his premises. The judge refused to charge that the powder magazine was dangerous in itself to plaintiff and his property, and was a private nuisance, and the defendant was liable to the plaintiff whether it was carelessly kept or not, and the plaintiff duly excepted to the charge and the refusal to charge.

We think that the charge made was erroneous and not warranted by the facts presented upon the trial. The defendant had erected a building and stored materials therein, which from their character were liable to and actually did explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the magazine was dangerous and liable to cause damage to the property of persons residing in the vicinity. The locality of works of this description must depend upon the neighborhood in which they are situated. In a city, with buildings immediately contiguous and persons constantly passing, there could be no question that such an erection would be unlawful and unauthorized. An explosion under such circumstances, independent of any municipal regulations, would render the owner amenable for all damage arising therefrom. That the defendant's establishment was outside of the territorial limits of a city does not relieve the owner from responsibility or alter the case, if the dangerous erection was in close contiguity with dwelling houses or buildings, which might be injured or destroyed in case of an explosion. The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree

of care and vigilance, evinces its dangerous character, and might in some localities render it a private nuisance. In such a case, the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application. The keeping or manufacturing of gunpowper or of fire-works does not necessarily constitute a nuisance *per se*. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used. In the case at bar, it should have been left for the jury to determine whether from the dangerous character of the defendant's business, the proximity to other buildings, and all the facts proved upon the trial, the defendant was chargeable with maintaining a private nuisance and answerable for damages arising from the explosion.

A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another: 3 Bl. Com. 216. Any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use: Wood's Law of Nuis., § 1, and authorities cited. The cases which are regarded as private nuisances are numerous, and the books are full of decisions holding the parties answerable for the injuries which result from their being maintained. The rule is of universal application that while a man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance to the injury of an adjoining proprietor or of his neighbors, even in the pursuit of a lawful trade: *Aldred's Case*, 9 Coke, 58; *Brady* v. *Weeks*, 3 Barb. 159; *Dubois* v. *Budlong*, 15 Abb. 445; *Wier's Appeal*, 74 Pa. St. 230.

While a class of the reported cases relate to the prosecution of a legitimate business, which of itself produces inconvenience and injury to others, another class refers to acts done on the premises of the owner, which are of themselves dangerous to the property and the persons of others who may reside in the vicinity, or who may by chance be passing along or in the neigborhood of the same. Of the former class are cases of slaughter houses, fat and offal boiling establishments, hog styes, or tallow manufactories, in or near a city, which are

offensive to the senses and render the enjoyment of life and property uncomfortable: *Catlin* v. *Valentine*, 9 Paige, 575; *Brady* v. *Weeks*, 3 Barb. 157; *Dubois* v. *Budlong*, 15 Abb. 445; *Rex* v. *White*, 1 Burr. 337, 2 Bl. Com. 215; *Farrand* v. *Marshall*, 21 Barb. 421. It is not necessary in these cases that the noxious trade or business should endanger the health of the neighborhood. So also the use of premises in a manner which causes a noise so continuous and exclusive as to produce serious annoyance, or vapors or noxious smells: *Tipping* v. *St. Helen's Smelting Co.*, 4 B. & S. (Q. B.), 608; *Brill* v. *Flagler*, 23 Wend. 354; *Pickard* v. *Collins*, 23 Barb. 444; Wood's Law of Nuis., § 5; or the burning of a brick kiln, from which gases escape which injure the trees of persons in the neighborhood: *Campbell* v. *Seaman*, 63 N. Y. 568. Of the latter class also are those where the owner blasts rocks with gunpowder and the fragments are liable to be thrown on the premises and injure the adjoining dwelling houses, or the owner or persons there being, or where persons traveling may be injured by such use: *Hay* v. *Cohoes Co.*, 2 N. Y. 159; *Tremain* v. *Cohoes Co.*, 2 N. Y. 163; *Pixley* v. *Clark*, 35 Id. 520.

Most of the cases cited rest upon the maxim "*sic utere tuo*," etc., and where the right to the undisturbed possession and enjoyment of property comes in conflict with the rights of others, that it is better, as a matter of public policy, that a single individual should surrender the use of his land for especial purposes injurious to his neighbor or to others, than that the latter should be deprived of the use of their property altogether, or be subjected to great danger, loss and injury, which might result if the rights of the former were without any restriction or restraint.

The keeping of gunpowder or other materials in a place, or under circumstances where it would be liable, in case of explosion, to injure the dwelling houses or the persons of those residing in close proximity, we think, rests upon the same principle, and is governed by the same general rules. An individual has no more right to keep a magazine of powder upon his premises which is dangerous, to the detriment of his neighbor, than he is authorized to engage in any other business which may occasion serious consequences.

The counsel for the defendant relies upon the case of *The People* v. *Sands*, 1 J. R. 78, to sustain the position that the defendant's business was neither a public nor a private nuisance. That was an indictment for keeping a quantity of gunpowder near dwelling houses and near a public street; and it was held (SPENCER, J., dissenting,) that the fact as charged did not amount to a nuisance, and that it should have been alleged to have been negligently and improvidently kept. It will be seen that the case was disposed of upon the form of the indictment, and while it may well be that an allegation of negligence is necessary where an indictment is for a public nuisance, it by no means follows that negligence is essential in a private action to recover damages for an alleged nuisance. In *Myers* v. *Malcolm*, 6 Hill, 292, it was held that the act of keeping a large quantity of gunpowder insufficiently secured near other buildings, thereby endangering the lives of persons residing in the vicinity, amounted to a public nuisance, and an action would lie for damages where an explosion occurred causing injury. NELSON, Ch. J., citing *The People* v. *Sands*, *supra*, says: "Upon the principle that nothing will be intended or inferred to support an indictment, the court said, for aught they could see, the house may have been one built and secured for the purpose of keeping powder in such a way as not to expose the neighborhood;" and he cites several authorities which uphold the doctrine that where gunpowder is kept in such a place as is dangerous to the inhabitants or passengers it will be regarded as a nuisance. The case of *The People* v. *Sands* is not, therefore, controlling upon the question of negligence.

Fillo v. *Jones*, 2 Abb. (Ct. of Ap. Dec.) 121, is also relied upon, but does not sustain the doctrine contended for; and it is there held that an action for damages caused by the explosion of fireworks may be maintained upon the theory that the defendant was guilty of a wrongful and unlawful act, or of default, in keeping them at the place they were kept, because they were liable to spontaneous combustion and explosion, and thus endangered the lives of persons in their vicinity, and that the injury was occasioned by such spontaneous combustion and explosion.

It is apparent that negligence alone in the keeping of gun-

powder is not controlling, and that the danger arising from the locality where the fireworks or gunpowder are kept is to be taken into consideration in maintaining an action of this character. We think that the request to charge was too broad, and properly refused. The charge, however, should have been in conformity with the rule herein laid down, and for the error of the judge in the charge, the judgment should be reversed and a new trial granted with costs to abide the event.

All concur.

Judgment reversed.

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[1] PENNSYLVANIA COAL CO. v. SANDERSON ET UX.

(94 Pennsylvania State, 302. Supreme Court, 1880.)

[2] **Custom of polluting streams.** A coal company pumped from its mines water which found its way into and polluted a previously pure stream. In an action against the company for damages, by a riparian owner of the stream: *Held,* that the fact that coal mining is an important industry would not relieve the defendant from liability, and that it could not justify its action on the ground that the customary mode of disposing of water pumped from mines in the coal regions was to allow it to flow into the adjacent natural watercourses, as such usage lacked the necessary age to establish a general custom, and such a custom would not only be unreasonable but unlawful.

Error to the Court of Common Pleas of Lackawanna County.

Trespass on the case, by J. Gardner Sanderson and wife, in right of said wife, against the Pennsylvania Coal Company, to recover damages for the alleged corruption of a stream of water used by plaintiff, by reason of the working of the colliery of defendant.

In 1868 the plaintiffs purchased a tract of land within the limits of the city of Scranton, on which they erected a handsome residence and other improvements, at a cost of about $80,000. A stream of water called "Meadow Brook" flows

[1] S. C. on former appeal, 11 M. R. 60.

[2] *The Debris Cases*, note 11, *post* p. 97.

through this tract, and before its purchase Mr. Sanderson traced it to its source, and it was, it appeared, one of the principal inducements to the purchase made by him. The stream was about an average width from its source to the house of plaintiffs. The water, when the stream was examined by Mr. Sanderson, was perfectly pure. Dams were built across the stream by Mr. Sanderson for the purpose of fish and ice ponds, and to supply a cistern, and the water was carried in pipes from the cistern to a ram and thence forced to a tank in the attic of the house. After these improvements were made the defendant opened a coal mine on the side of a hill about three miles above the house of the plaintiffs. A drift was first made into this mine and a shaft afterward sunk. The water which collected in this drift, as well as that pumped by engines from the shaft, ran into the creek. It was alleged that the effect of the water from the mine was to corrupt the water of the stream so as to unfit it for domestic use. There was evidence that the fish in the brook were destroyed; that the willows along the bank died; that the pipes connecting the stream with the cistern, the ram and the house, were corroded and eaten out; that the water was unfit for household use in 1873, and that in 1875 its use for all purposes was abandoned. No change was made in the appearance of the water, but it was conceded that it was acid and unfit for use.

At a former trial in Luzerne county, the court granted a compulsory nonsuit, which judgment this court reversed (see 5 Norris, 401), and a new venire having been awarded, the suit was transferred to Lackawanna county on the creation of said county.

At the trial, before HANDLEY P. J., the defendant offered to show by the witness on the stand and other witnesses, that it was mining coal from its mines upon this stream, and making such disposition of the mine water from its mines as, according to custom and common consent, has been the mode ever since coal mining was begun and in the mode that the memory of man runneth not to the contrary. It proposed to show a custom for the whole anthracite coal region in Lackawanna and Wyoming.

Objected to, and objection sustained. (2d assignment of error.)

The first point of the plaintiffs with the answer of the court thereto, were as follows:

"If the jury find from the evidence that the operations of the defendant, by polluting the waters of the Meadow Brook, caused an injury to the plaintiffs prior to the bringing of their action, then they are entitled to recover as damages such an amount as will compensate such injury."

Ans. "If you find from the evidence that the defendant did pollute and corrupt the waters of the Meadow Brook stream, then we affirm this point."

The first point of the defendant, with the answer of the court thereto, were as follows:

If the jury believe from the evidence that it was impossible for the defendant to mine its coal on its lands along this stream without discharging the mine water from its mines, and that the mining was done without malice or negligence, and that no foreign substance was introduced into the mine water by the defendant, and that when the mine water was so discharged it followed the law of gravity, as directed by the natural conformation of the land, and flowed by a natural flow into this stream, and thence through the plaintiff's property, then, even if thereby the plaintiffs were damaged, it is *damnum absque injuria*, and plaintiffs can not recover.

Ans. "The Latin language in this point simply means a loss without an injury. If you find from the evidence that it was possible for the defendant to mine its coal on its lands along this stream without polluting the water thereof, then we can not affirm this point."

Verdict for plaintiffs for $250, and after judgment thereon the defendant took this writ and alleged *inter alia*, that the court erred in rejecting the above testimony and in the answers to the foregoing points.

A. T. MCCLINTOCK, I. J. POST and SAMUEL DICKSON, for plaintiff in error.

A. RICKETTS, for defendants in error.

GORDON, J., delivered the opinion of the court.

The material points in this case have been most fully

and carefully discussed in the opinion delivered by our late lamented brother Woodward, in this same case, when here before, and which may be found in 5 Norris, 401. As that opinion has been faithfully followed in the court below, we are relieved of any extended examination of the case as now presented. Whether or not the injury complained of resulted from the act of the defendant in pumping deleterious mine water into the Meadow Brook, was fairly submitted to the jury, and that body found that that was the immediate cause of the injury. When, in 1868, Mrs. Sanderson purchased her property on Meadow Brook, she found the water of this stream pure and valuable for domestic purposes. Her right to have and use these waters as she found them, is undoubted. This right, though of an incorporeal character, was as absolute as her right to the land through which they flowed. But that right has been destroyed, or its value seriously impaired, by the direct act of the defendant. As, then, it has been the cause of the injury, why should it not be held to an account therefor? The answer is twofold: 1. It is said, the pollution of this brook results from the necessities of coal mining and as that is an industry important to the welfare of this commonwealth the right of the plaintiff must yield to it. But this argument is fallacious in this: the mining operations of the defendant do not involve the public welfare, but are conducted purely for the purposes of private gain. Incidentally all lawful industries result in the general good; they are, however, not the less instituted and conducted for private gain, and are used and enjoyed as private rights, over which the public has no control. It follows that none of them, however important, can justly claim the right to take and use the property of a citizen without compensation. 2. It is urged that the customary mode of disposing of water pumped from mines in the Lackawanna and Wyoming coal regions has been to allow it to flow into the adjacent natural watercourse. Of this proof was offered, and that for the purpose of showing a general custom thus to use the rivers, creeks, and smaller streams of this part of the State, and, it may be added, so to destroy the rights of riparian owners. As a local custom or prescription, this has no application to the case in hand, for the colliery of the defendant appears to be the only one within the territory drained

by Meadow Brook, and the pollution of its waters has occurred since the plaintiff's purchase. As a general custom it lacks the necessary age, for the beginning of deep coal mining in the regions above named is quite within the memory of men yet living. Wanting this it fails in a particular essential to the establishment of such a custom: *Jones* v. *Wagner*, 16 P. F. Smith, 429. But more fatal still, to the defendants' pretension, is the fact that the effort is thus to justify the disturbance of private property for the advancement of the private interests of the defendant corporation, and that, not under the plea of an ancient customary use, arising before the plaintiffs acquired title, but of a general custom which would authorize the present injury or destruction of the rights of riparian owners. But a custom such as this would not only be unreasonable but also unlawful, and therefore worthless. It is urged that mining can not be carried on without this outflow of acidulous water, hence, of necessity, the neighboring streams must be polluted. This is true, and it is also true that coal mining would come to nothing without roads upon which to transport the coal after it is mined; therefore roads are necessary; but it does not follow that for such purpose the land of an adjacent owner may be taken or his right of way incumbered without compensation.

If, indeed the customs set up were to prevail, then, at least so far as coal mining companies are concerned, there would be an abrogation of the 8th section, Art. 14, of the constitution, which provides that "municipal and other corporations invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction and enlargement of their works, highways or improvements." Not only would we thus have a custom superior to the supreme law of the land, but one reaching even beyond the possible sovereignty of the State, in that it would empower private persons, for private purposes, to injure or destroy private property, and that without compensation. A custom such as this is radically bad, and can not be sustained.

Judgment affirmed.

PAXSON and STERRETT, JJ., dissented.

[1]PENNSYLVANIA LEAD CO.'S APPEAL.

(96 Pennsylvania State, 116, 42 Am. Rep. 534. Supreme Court, 1880.)

Injunction against continuing injuries. Where a business complained of is a dangerous nuisance, and the injury is continuous and cumulative and the mischief irreparable, a court of equity will enjoin the prosecution of such business.

Idem—Lead smelting works. And if it appears that works for smelting lead are of such a character and the injury inflicted of such nature a court of equity will restrain their use.

Appeal from the Court of Common Pleas of Allegheny County.

Bill in equity filed by Joseph P. McIntyre against the Pennsylvania Lead Company.

The bill in substance alleged: 1. That complainant has owned, since April 12, 1871, a certain farm situate in Robinson township, in Allegheny county, containing about forty-six acres. 2. That prior to the unlawful acts of the defendant complained of, the said farm was a fertile tract, and used for farming purposes. 3. That some time in the year 1873, the defendant corporation acquired a piece of land adjoining said farm on the westerly side thereof, and erected thereon smelting works, for the smelting of leads and other minerals, said works being located within about seventy-five feet of the said farm. 4. That shortly after the completion of said works the defendant company commenced operating the same for the smelting of lead and other minerals, and has since continued to do so, and intends to do so in the future. 5. That the said works are so constructed and operated as to emit from the stacks and chimneys thereof, offensive, noxious and poisonous gases, fumes and vapors, and are so located that the said gases, fumes and vapors descend and rest upon said farm. 6. That the said gases, fumes and vapors have injuriously affected and are injuriously affecting said farm; that they have poisoned and are poisoning the soil and vegetation and products of said farm, rendering the latter unfit for consumption; that portions of said farm have already been

[1] See full note as to enjoining noxious trades, 42 Am. Rep. 540.

blasted and rendered barren, and the vegetation thereon destroyed; and this mischief is continuous, and will continue so long as the defendant's said works are operated as aforesaid. 7. That the said gases, fumes and vapors are injurious to cattle grazing upon said land or eating the products thereof; and plaintiff is informed and believes that horses and cattle have died from grazing and eating the fodder from said farm, poisoned by gases, fumes and vapors aforesaid. 8. That the gases, fumes and vapors aforesaid are noxious to persons living upon said land or inhaling the same. 9. That said works emit smells which are offensive and intolerable to persons residing on said farm. 10. That the said works are a continuing nuisance to said farm, and are producing and will continue to produce irreparable injury. 11. That at the time said works were being erected, plaintiff was not fully informed as to the uses to which they were to be put, nor had he any knowledge as to how they were to be operated, and he then had no personal experience as to the effect produced by such works; and it was not until the defendant's works had been in operation for some considerable time that he discovered the full effect from the gases, fumes and vapors aforesaid; and it is only within a period of a few weeks that he has learned from chemical analysis of the soil and vegetation of his farm the extent to which they are being poisoned.

Equitable relief was prayed for: 1. That it be decreed that the defendant abate the nuisance complained of. 2. That the defendant company be restrained by the order and injunction of this honorable court from operating its smelting works in such manner as harmfully or injuriously to affect the plaintiff's farm or the vegetation thereof, and from allowing or permitting the gases, fumes or vapors from said works to descend or fall upon said farm. 3. General relief.

The defendant's answer in brief was: 1. That the allegations contained in the first paragraph of said bill are true. 2. That the allegations contained in the second paragraph are substantially true, though only a portion of said farm is a fertile tract and used for farming purposes, the remaining portions being unfit therefor. 3. That the allegations contained in the third paragraph of said bill are true, except in this, that the defendant company's works are distant some

five or six hundred feet from the plaintiff's dwelling. 4. That the allegations contained in the fourth paragraph of said bill are true. 5. The averments of the fifth paragraph of said bill the defendant company denies, and in this connection avers that its works are constructed after the most approved method, and with special reference to a prevention of any injury or damage to surrounding and neighboring property; and denies that from the operation of said works any injuries have resulted, do, or will result to the plaintiff. 6. That the averments contained in the sixth paragraph of said bill are not true. 7. That it is not true that there are any gases, fumes and vapors produced by the operation of the defendant's works, which are injurious to cattle grazing upon the plaintiff's land eating the products thereof; nor is it true that horses and cattle have died from grazing and eating fodder from said farm, because of any effect had thereon by the proximity of defendant's works thereto, or their operation. 8. And defendant company denies the allegations contained in the eighth paragraph of said bill. 9. It further denies the allegation contained in the ninth paragraph of said bill. 10. It further denies the allegations contained in the tenth paragraph of said bill. 11. That it is not true as averred in the eleventh paragraph of said bill, that at the time said works were being erected the plaintiff was not fully informed as to the uses to which they were to be put; but on the contrary, as defendant avers, the said plaintiff had full knowledge of the contemplated erection of said works, and was for a time in negotiation with the defendant company with a view to selling to it the whole or a portion of his said property for the purposes of said work; that during the time the said works were in process of erection, said plaintiff had daily knowledge of what was going on, saw the result of the expenditure of large sums of money made by the defendant in the putting up of said works, and has from that time until the present had a continuous experience as to the operations carried on by the defendant. It is not true that the soil and vegetation of the plaintiff's farm is or has been in anywise affected by any gases, fumes and vapors from defendant's works. 12. That the said works had been erected at an expense of about $140,000; that this expense was incurred with the knowledge of the plaintiff, and

without objection or protest upon his part; that the said works are perhaps the best constructed works of the character in the United States; that the defendant company employs in said works an average of from sixty to seventy-five men daily, who reside in the vicinity thereof, and manufactures large quantities of lead, which it supplies to the trade in the city of Pittsburg, and ships to other places; that the interference with the operation of said works would result in great loss and damage to the defendant company, and to the trade of the city of Pittsburg, and that so far from the existence and operation of said works producing any damage to the plaintiff, it is a fact that his said property is now by him rented, and has been for some time past, for a much larger sum than it was at the time said works were originally erected. 13. And the defendant company denies that the said plaintiff has sustained any damage, or is likely to sustain any damage, by reason of the erection and operation of defendant's works, in any way, and that he has sustained, does, or will sustain any damage for which he has not a complete and adequate remedy at law.

The master, to whom the case was referred, Jacob H. Miller, Esq., found the facts as follows:

1st. The plaintiff is the owner in fee simple of a farm of 46 acres and 8 perches of land, situate near Mansfield, in Robison township, Allegheny county, with farm house and buildings thereon, on the line of the Pittsburg, Cincinnati and St. Louis Railway, at a distance of seven miles from the Union depot, in the city of Pittsburg. This farm was purchased by him on April 12, 1871, for $21,000. The plaintiff has not resided on his farm, but has leased it to farmers and croppers. 2d. That the defendant's real estate consists of nearly nine acres of land, adjoining the farm of the plaintiff. The line bounding the defendant's land upon the south is coincident with the plaintiff's northerly line, and is the center of the roadway of the railway, which separates the two tracts and is used and occupied. Both tracts are bounded on the east by Chartier's creek, and a large portion of each is creek bottom, but the western portion of both, where the buildings are located, is elevated about fifty feet above the bottom land and falls off gradually toward it. 3d. That in the spring of 1873 the defendant company commenced the erection of lead smelt-

ing works upon their land near the railroad, within seventy-five feet of the plaintiff's land and five hundred or six hundred feet from his farm house. The erection of the works occupied about seven months but new erections and changes have been since made. The buildings and ground have cost $140,000. 4th. That the works were originally constructed for the smelting of ores and the production of soft leads, silver, and whatever metals are of value in the ores received by the company, and for the refining of crude furnace lead bullion, produced from ores found in western territories, which ores contain silver and gold as well as lead. Since May, 1877, the exclusive business of defendant has been the branch last named, viz., the refining of crude furnace lead bullion and the production of merchantable lead, gold and silver. The defendant's works have a larger capacity than any other lead works in the country, viz., 14,000 to 15,000 tons of soft lead a year, and are now producing one fifth of the whole lead product of the United States. Their furnaces and other appliances are abreast of the times as to improvements and every precaution has been taken for the prevention of the escape of lead from their flues known to the most expert in the business. The amount of the lead produced and the value of the lead, silver and gold produced by the defendant since commencing operations, are as follows:

In 1873, lead, 223 tons; value $94,203.62; In 1874, lead, 395 tons; value $129,056.61; in 1875, lead, 2,641 tons; value $745,-779.52; in 1876, lead, 3,694 tons; value $975,144.63; in 1877, lead, 8,934 tons; value $1,703,840.79; first six months of 1878, lead, 6,417 tons; value $1,111,772.73.

5th. That the plaintiff's land and the defendant's works are located in a farming district; but on the tract immediately westward of the defendant's land, is located the Mansfield Coal and Lime Company, whose coke ovens are near the lead works, and on the same side of the railroad. The railroad is between the ovens and the western portion of the plaintiff's farm. 6th. That prior to the time defendant's smelting operations began, the plaintiff's land was fertile and well adapted to farming and grazing. 7th. That the defendant's works emit from the chimneys and stacks thereof (in the processes of smelting ores and refuse and desilvering lead), offen-

sive and poisonous fumes and vapors, which are blown upon, descend and rest upon the plaintiff's farm, and that lead is thus distributed over said farm to a distance of at least fifteen hundred feet from said works. 8th. That these lead fumes and vapors have injuriously affected and are injuriously affecting the plaintiff's farm; that they have lessened the fertility of a portion of the farm lying nearest to the lead works; that they have poisoned and are poisoning the vegetation and products of said farm, rendering the latter unfit for consumption; that these injuries are still continuing. 9th. That horses and cattle grazing upon plaintiff's farm and eating the products thereof have died from lead poisoning, and that the lead was communicated to them through the herbage and fodder on which they fed. That the horses and cows of Jacob Wehrle, who was the tenant of the plaintiff from April 1, 1875, to April 1, 1876, and those of his son Frederick Wehrle, that died upon the plaintiff's farm, were poisoned in the manner above stated. 10th. That since April 1, 1876, the only crop cultivated upon the farm is corn, which is husked on the stalk and the fodder left on the ground; and no horses, cattle or live stock of any kind are reared or pastured on the farm. 11th. That the fumes and vapors from the defendant's works are offensive and nauseating to persons living upon the land or inhaling them. 12th. That the plaintiff's farm is greatly diminished in value by reason of the lead deposited and being deposited upon it from the defendant's works. Its rental value is also greatly depreciated. 13. That the lead works of the defendant are a nuisance to the plaintiff's farm.

Upon the whole case, law and fact, the master is of opinion that the plaintiff is entitled to the relief prayed for by the second paragraph of his prayer, and so reports.

Exceptions were filed to this report, and after argument thereon the court, STOWE, P. J., filed the following opinion:

"The defendant's interest in the maintenance of their works is such, and the public is so much concerned in the same result, that I have felt it my duty to scan, not only closely but critically, the evidence in the cause, with the purpose of escaping, if possible, from the conclusion arrived at by the master. After a very careful examination of the whole case, I am compelled to concur entirely with his findings of the facts, and

see no way of avoiding the result indicated by him, without palpably disregarding the principles established by judicial authorities and decisions, not only in England but in this country as well.

"From the first I could see no hope for defendants, except it might be in the application of the principles laid down by Chief Justice Thompson, in *Richards' Appeal*, 7 P. F. Smith, 105, where he says: 'A decree in equity is never of right, but of grace. Hence, the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing and leaving the party to his redress at the hands of a court and jury. If, in conscience, the former should appear, he will refuse to enjoin.'

"Were it not for the dangerous quality of the 'fumes' thrown out by defendant's works, which certainly affect growing vegetation, so as to make it not only unfit for food, but, when eaten, destructive of animal health and life, and for the extremely nauseous character of the effluvia emitted, and the evident uncertainty at what point that which is now shown to be merely offensive to the senses may begin to be pernicious, I could most probably have been content to refuse the injunction prayed for and have remitted the plaintiff to his action at law, to recover such damages as he might show had accrued to his real estate, by reason of injury to its productive capacity or general value for farming purposes.

"But these are disadvantages and injuries incident to risks arising from the peculiar character of the fumes emitted, which will not admit of compensation, and the possibility, if not probability, that the health and personal safety of persons living upon plaintiff's land will sooner or later be involved, renders the case such that I am constrained to agree with the master, and conclude that a decree such as he recommends should be made."

From this decree this appeal was taken by defendant, which alleged that the court erred in sustaining the master's findings of fact. In finding that the plaintiff is not estopped from maintaining this proceeding. In deciding that an injunction can issue in this case without a previous trial at law. In deciding that the plaintiff has not an adequate remedy at law for any grievance disclosed by the evidence. In not refusing to

enjoin the defendant on the principle that when greater injury would ensue by enjoining than by leaving a party to his redress by a court and jury, equity will refuse to interfere. In the decree made enjoining the defendant.

HAMPTON & DALZELL, for appellant.

GEORGE SHIRAS, JR., T. H. BAIRD PATTERSON and M. W. ACHESON, for appellee.

Mr. Justice GORDON delivered the opinion of the court.

'The power of the courts of common pleas of Pennsylvania to entertain bills for the restraint or abatement of nuisances, where they affect private rights, is undoubted; neither is the exercise of this power prevented by the fact that the party complaining may have a remedy by indictment or by an action at law: *Bunnell's App.*, 19 P. F. Smith, 59; *Dennis* v. *Eckhardt*, 3 Grant, 390. It is true, indeed, that this power is limited to those cases where common law forms of action do not furnish an *adqeuate* remedy, and the chancellor may also refuse to act where greater injury would result from an injunction than by leaving a party to his redress before a court and jury: *Richards' App.*, 7 P. F. Smith, 105. But where, in ordinary parlance, the damage sought to be prevented is irreparable, that is, where the wrong is repeated from time to time, or is of a continuing character, or productive of damages which can not be measured by ordinary standards, equity may be invoked: *Com.* v. *Railroad Co.*, 12 Harris, 159.

The appellant, however, contends that an injunction ought not to issue until the complainant's right has been established by an action at law. This suggestion would, in a doubtful case, have force, for the chancellor, in a case like the present, will act only when he can do so without hesitancy. If the case be doubtful he will refuse to interfere until the right, upon which the claim for relief is based, is definitely settled by trial on the common law side of the court. But to say that equity can not move in any case until a jury has determined the nuisance to be an existing fact, is to make our equity system a mere dependent on the common law courts, and its jurisdiction servient and inferior.

But a conclusion such as this does not accord with the intent of the act of 1836; for by it the judges of the common pleas are clothed, not with partial and dependent, but with full and independent chancery powers over all the subjects therein mentioned. We may then adopt the language of Earl, J., in *Campbell* v. *Seaman*, 63 N. Y. 568, when speaking of injunctions against nuisances: "It was formerly rarely issued in the case of a nuisance until the plaintiff's right had been established at law; and the doctrine which seems now to prevail in Pennsylvania, that the writ is not a matter of right but of grace, to a large extent prevailed; but a suit at law is no longer necessary, and the right to an injunction in a proper case in England and most of the States is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation, and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate jurisdiction. It is matter of grace in no sense except that it rests in the sound discretion of the court."

Nor have our own courts been less ready to adopt the same doctrine; hence it has been held that an injunction would be issued to prevent the cutting down of timber and ornamental trees to the injury of the reversion: *Denny* v. *Brunson*, 5 Casey, 382; or to restrain a trespass of a permanent or continuing character: *Masson's Appeal*, 20 P. F. Smith, 26. So may acts of trespass or nuisance be restrained to prevent a multiplicity of suits, or where such wrongful acts might become the foundation of an adverse right: *Scheetz's Appeal*, 11 Casey, 88.

Nor do we understand how Richards' Appeal can help the defendant; for while no one disputes the position that a bill for suppression of a nuisance may be dismissed on general demurrer for want of equity, unless it appears from the subject-matter affected by the alleged nuisance that there is danger of irreparable mischief, or of an injury such as can not be adequately compensated in a suit at law, yet, we apprehend, even under this authority, a general demurrer would scarcely have sufficed to turn the bill before us out of court. In it we find these several allegations: that the defendant's works are so constructed as to emit poisonous and noxious gases, fumes and

vapors, and that they are so located that these noxious and poisonous gases fall upon the plaintiff's land, thereby poisoning and destroying both soil and vegetation; that cattle and horses have died from eating the fodder and herbage thus poisoned; that these fumes and vapors are offensive and noxious to persons resident upon said farm, and that these injuries are continuous and irreparable. It would certainly be a very bold solicitor who would risk the admission of such facts on a general demurrer, and it is a significant fact that the learned counsel for the defendant have attempted no such experiment.

The bill, then, is sufficient to evoke the action of a court of equity, and all that remains is to ascertain if the bill be supported by the evidence. As to this, after a careful examination of the testimony we conclude that the findings of the master are correct, and that the complainants' complaint is fully sustained by the proofs. And, indeed, it is to be remembered, *in limine*, that whether a smelting house for lead is or is not a nuisance *per se* to adjacent land depends very much upon its situation. "If," says Blackstone, "one erects a smelting house for lead so near the land of another that the vapor and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance." All intelligent persons are aware that lead vapors are poisonous, and this the more so as they are often, as in the case in hand, accompanied with arsenic; in this matter we need not chemists and experts to teach us, for common experience is sufficient. When, therefore, we learn that the works of the defendant are to the windward of the plaintiff's land, within seventy-five feet of his northern line, and but five or six hundred feet from his farm house, we need but little evidence to satisfy us that the smoke from these works is seriously injurious to his property; but in addition to what we might naturally expect from the design and character of this business, and which might in themselves have been sufficient to have sustained a bill to restrain the erection of these works, we have the findings of the master, based on undoubted testimony, as follows: "That prior to the time the defendant's smelting operations began, the plaintiff's land was fertile and well adapted to farming and grazing; that the defendant's works emit from the stacks and chimneys thereof, in the process of smelting ores and refuse and desilvering lead, offensive

and poisonous fumes and vapors, which are blown upon, descend and rest upon the plaintiff's farm, and that lead is thus distributed over said farm to a distance of at least fifteen hundred feet from said works; that these lead fumes and vapors have injuriously affected and are injuriously affecting the plaintiff's farm; that they have lessened the fertility of a portion of the farm lying nearest the lead works; that they have poisoned and are poisoning the vegetation and products of said farm, rendering the latter unfit for consumption, and that these injuries are continuing; that horses and cattle grazing upon the plaintiff's farm and eating the products thereof have died from lead poisoning, and that the lead was communicated to them through the herbage and fodder on which they fed; that the horses and cows of Jacob Wehrle, who was tenant of the plaintiff from April 1, 1875 to April 1, 1876, and those of his son Frederick Wehrle, that died upon the plaintiff's farm, were poisoned in the manner above stated; that since April 1, 1876, the only crop cultivated upon the farm is corn, which is husked on the stock and the fodder left on the ground; and no horses, cattle or live stock of any kind are reared or pastured on the farm; that the fumes and vapors from the defendant's works are offensive and nauseating to persons living upon the land or inhaling them; that the plaintiff's farm is greatly diminished in value by reason of the lead deposited and being deposited upon it from the defendant's works. Its rental value is also greatly depreciated."

To this he might well have added that the plaintiff's farm was thereby rendered not only uncomfortable but dangerous as a place of human habitation; for a place where not only the herbage and ground are so literally poisoned by deposits of lead that it is readily discoverable by chemical analysis, but where at times also the air is so filled with the noxious vapors of lead and arsenic as to make those sick who encounter them, might certainly be called dangerous to human health and life.

In this connection another important circumstance must be considered, that is, the cumulative character of this injury; it increases from year to year, not only as the works are enlarged, but as more and more lead is added to the ground. The deposit is an indestructible metal that is neither evaporated nor absorbed, and necessarily it must accumulate as long

as the cause of the deposit continues. Hence, as it was observed at first, even on the land nearest the works the effect was scarcely observable, but as time went on it became more and more apparent until finally the soil was wholly unfitted for agricultural purposes, so, in like manner, may these blighting influences continue until the whole farm is made barren and unproductive. Thus it is that we find in this case every element necessary to call forth the exercise of equity powers. The business complained of is a dangerous nuisance, the injury continuous and cumulative, and the mischief irreparable. If, as in *Dennis* v. *Eckhardt*, 3 Grant, 390, a tin shop was enjoined on account of its noise, or as in *Campbell* v. *Seaman*, the use of a brick kiln was restrained because the vapor therefrom was destructive to the plaintiff's trees and vines, much more should a business be enjoined which is destructive alike to vegetable and animal life.

The rule *sic utere tuo ut alienum non lædas* is the most valuable one and must be maintained, for our civilization is to be cherished and preserved, and it is not at all to the purpose to answer the charge of a violation of this rule that the defendant's works have been erected at a great outlay of capital; that they are important to the public at large, and give employment to many men. Says Wood, in his work on Nuisances, Sec. 794: "A person can not go on and build extensive works and make heavy expenditures of money for the exercise of a trade or business that will invade the premises of another with smoke, noxious vapors or noisome smells, to an unwarranted or unlawful extent, and then when called upon to desist turn around and claim immunity for his trade or business on the ground that to stop it would involve him in ruin; nor that it is a necessary result of carrying on his trade at all, and that he has adopted the most approved methods known to science, or which human skill has devised; nor that his trade is a useful one and beneficial to the community, or to the nation, or that by bringing a large number of workmen into the community it has enhanced the value of the plaintiff's property."

Where justice is properly administered rights are never measured by their mere money value, neither are wrongs tolerated because it may be to the advantage of the powerful to

impose upon the weak. Whether it be the great corporation with its lead works, or the mechanic with his tin shop, the rule is the same: "So use your own as not to injure another." Moreover, there is, after all, one underlying principle which influences both, and that is private gain. Lead works and tin shops alike may result incidentally in the public good, but this is only an incident; for the primary object which induces the exercise of either trade is personal good; therefore to neither party is the general community under any special obligation, and as a consequence there is no good reason why the rules of law should be relaxed in the one case rather than the other.

Again, we can not but regard this company as unfortunate in the selection of a place for the erection of its works. To undertake the business of lead smelting in the midst of a rich suburban valley, occupied by farms and country residences, was, to say the least of it, not very prudent. Lord Cranworth in the case of *The St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Ca. 652, quoting Mr. Justice Mellor, says: "It must be plain that persons using a lime kiln, or other works which emit noxious vapors, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." If, however, any place is improper for a business of this kind, where injury may result from it to others, surely a situation like that selected by the defendant ought, in the outstart, to have been regarded as improper, since common knowledge and prudence should have informed its managers that injury, sooner or later, must result to the adjacent property.

But it is insisted that the plaintiff has no equity as against this company, because he gave it no notice before or at the time of the erection of its works. But of what would he give it notice? Of the effect the fumes would have upon his farm? But the master has found that he knew nothing of lead works and their probable effect on adjacent land; he could not, therefore, notify it of that of which he was ignorant. One would suppose that on this matter the managers of the corporation would be fully posted; if they were so posted, if they knew what the effect would be on the surrounding property,

then they acted with knowledge wantonly, and notice to them was unnecessary; but if they were ignorant, if they knew not the consequences which would follow the business in which the company was about to engage, then they ask too much of the plaintiff when they require of him a knowledge of their own business which they themselves did not possess.

Decree affirmed.

1. Coal dust considered as a nuisance: *Barrow* v. *Richard*, 8 Paige Ch. 351.

2. Right of action against upper proprietor for pollution of stream: *Wood* v. *Waud*, 3 Exch. 748.

3. Jury to determine amount of damages to which surface owner is entitled for injury to growing crops from negligent coal mining and by heat and smoke from coke ovens: *Brown* v. *Torrence*, 10 M. R. 692.

4. Digging ditches and mining within plaintiff's inclosure upon the public domain held to be a nuisance: *Fitzgerald* v. *Urton*, 12 M. R. —.

5. No recovery for injuries from nuisances which affect the public generally: *Grisby* v. *Clear Lake Water Co.*, 40 Cal. 397.

6. Continuance of nuisance by party who is not the creator of it: *Id.*

7. Action for abatement of a nuisance by the raising of defendant's dam two feet higher, brought at the time defendant commenced to raise the dam, held to be premature: *Harvey* v. *Chilton*, 11 Cal. 114.

8. The remedies against a canal company provided by their act of incorporation, for injuries arising from the construction of the works, do not exclude the common law remedies for injuries arising from an abuse of their privileges, or for the neglect of their duties: *Schuylkill Nav. Co.* v. *McDonough*, 33 Pa. St. 73.

9. Lime kiln, when a continuing nuisance: *Slight* v. *Gutzlaff*, 35 Wis. 675.

10. Nuisance caused by carrying on works in the vicinity, which fill the air with smoke and cinders, and render it injurious to health, is not of such a public nature that the remedy is confined to a public prosecution: *Wesson* v. *Washburn*, 13 Allen, 95.

11. Mining by hydraulics, in the Yuba river, continued from year to year, resulting in filling up the channel, destroying the riparian farms and prevented only from destroying cities on the banks by levees. *Held*, a public and a private nuisance: *The Debris Cases; Woodruff* v. *North Bloomfield Co.*, 1 West C. R. 183; 16 Fed. 25; 18 Fed. 753; *People* v. *Gold Run Co.*, 4 West C. R. 511, 521; *Hobbs* v. *Amador Co.*, Id. 523.

12. No right can be acquired by prescription to maintain a public nuisance: *Id.*

QUICKSILVER MINING CO. v. HICKS.

(4 Sawyer, 688. U. S. Circuit Court, District of California, 1868.)

[1] **Occupation distinguished from possession.** Any subjection of land to the dominion of a party, such as cultivation or other substantial use, is sufficient evidence of possession to enable an adverse claimant to maintain ejectment against him. Actual occupation in person, or by agent or servant, is not essential.

Possession of land shown by use. Where a party claiming a small strip of land on the bank of a creek, constructed and maintained a bridge over the creek abutting on the premises, it was *held*, that this use of the land was sufficient evidence of possession to maintain ejectment.

[2] **Boundary along a meandering stream.** Where land adjoining a creek was described in a patent as bounded on the side of the creek by a line meandering from a point in its center down the center a certain distance to a station on the bank, and thence a further distance to another station, and so on from station to station on the bank, to a point where the line left the creek, it was *held*, that the creek constituted the boundary of the land, and that the courses between the stations only indicated the general direction of the stream, being points fixed by the surveyor to enable him to compute the amount lying between the creek and the other boundaries.

Before Mr. Justice FIELD.

This was an action for the possession of a parcel of land situated in Santa Clara county, and was tried at the July term, 1868, by the court without the intervention of a jury, upon stipulation of the parties. The facts are sufficiently stated in the opinion of the court.

S. L. JOHNSON, for plaintiff.

S. O. HOUGHTON, for defendant.

Mr. Justice FIELD.

The property in controversy in this case is a narrow strip of land in Santa Clara county, lying on the northerly side of Capitancillos creek, measuring about one fourth of

[1] *Strepey* v. *Stark*, 7 Colo. 614; *North Noonday Co.* v. *Orient Co.*, 9 M. R. 531.

[2] *Murphy* v. *Copeland*, 58 Iowa, 409; 43 Am. R. 118; *Branham* v. *Turnpike Co.*, 1 Lea, 704; 27 Am. R. 789; *Holbert* v. *Edens*, 5 Lea, 204; 40 Am. R. 26.

a mile in length, and between thirty and fifty feet in breadth, and containing a little more than two and one half acres. The action is brought for the entire tract of land granted by the Mexican government to Justus Larios, and patented by the United States to Charles Fossatt in February, 1865, containing over three thousand acres. The complaint alleges the seizin by the plaintiff, a corporation created under the laws of the State of New York, of that entire tract, and its ouster therefrom by the defendant; but on the trial it was not pretended that the defendant had ever asserted ownership or been in possession of any greater portion than the narrow strip mentioned. The claim to this strip by the respective parties arises from their different construction of the language of the patent to Fossatt describing the boundaries of the tract confirmed to him. The defendant asserts title to the premises under a conveyance from the pueblo of San Jose. The land patented to that corporation by the United States is bounded on one side by the land previously patented to Fossatt. The principal question, therefore, and the source of controversy between the parties, is one of boundary.

The incorporation of the plaintiff is admitted by the general denial which the defendant has pleaded. The want of legal capacity to sue must be specially set up in the answer by the provisions of the Practice Act of the State, which by rule governs in common law cases in the Circuit Court of the United States.

The possession by the defendant of a portion of the land in controversy is sufficiently established by the construction and maintenance by him of a bridge, over Capitancillos creek, abutting on the premises. This bridge he has, against the protestation and resistance of the plaintiff, rebuilt after it was destroyed, and has persistently maintained and used it. The possession which must be shown in the defendant to enable an adverse claimant to the land to maintain ejectment against him, is not necessarily an actual occupation in person or by agent or servant. Any subjection of the property to the will and dominion of the party is sufficient. Such subjection is shown by its cultivation or by any other substantial use, as well as by residence thereon by himself or his tenant. No more complete subjection to the dominion of the defendant,

of the land covered by the abutment of the bridge, could be shown, than by his appropriation of it for that purpose. The appropriation has always been accompanied by a claim of ownership; a claim asserted not merely to the particular parcel on which the bridge rests, but to the entire strip of land in dispute. It is sufficient, however, for the maintenance of the action that the possession by the defendant is shown of any portion of the premises claimed.

The patent to Fossatt in describing the land confirmed to him, gives the boundary line on one side as running to the center of Capitancillos creek, and thence meandering down the center of the same one chain and ninety links to a station; thence north seventy-four degrees, fifteen minutes west, five chains, to another station, and so on from station to station, according to various courses and distances, to a point where the line leaves the creek. The several stations designated are on the bank of the creek, and between the line drawn from one to the other and the creek, lies the narrow strip of land in controversy. The defendant contends that the line drawn from station to station constitutes the boundary. The plaintiff, on the other hand, insists that the creek is the boundary, and that the courses between the stations only indicate the general direction of the stream, and that the stations are points fixed by the surveyor to enable him to compute the extent of land lying between the creek and the other boundaries. This latter view is undoubtedly correct. The language stating that the line meanders down the center of the stream settles the point. The stations could not of course be placed in the stream; nor could the estimate of the area in the tract confirmed be made from a tortuous line following the sinuosities of the creek; of necessity, then, the stations had to be fixed on the bank, and they were fixed more or less distant from the creek, according to the condition of the bank at the points selected.

In *Luce* v. *Carley*, 24 Wend. 451, one of the courses in the description of the premises in the deed under which one of the parties claimed ran to a hemlock tree, "standing on the east bank of the river; from thence down the river as it winds and turns twenty four chains and ninety-four links to a hard maple tree." It was held that the grantee took to the

center of the river. "It is never thought," said the court, "that monuments mentioned in such a deed as occupying the bank of the river are meant by the parties to stand on the precise water line at its high or low mark. They are used rather to fix the termini of the line, which is described as following the sinuosities of the stream, leaving the law to say, as the line happens to be above or below tide water, whether the one half of the river shall be included, with the islands which lie on the side of the channel nearest to the line described. Where the grant is so framed as to touch the water of the river, and the parties do not expressly except the river, if it be above tide, one half of the bed of the stream is included by construction of law. If the parties mean to exclude it, they should do so by express exception. Without adhering rigidly to such construction, water gores would be multiplied by thousands along our inland streams, small and great, the intention of parties would be continually violated, and litigation become interminable."

The concluding observation of the court in this citation would be applicable to innumerable cases in this State were any other construction adopted than the one approved.

The surveyors who were produced by the plaintiff had had great experience in the survey for the government of lands confirmed to claimants under Mexican grants, and they stated that the measurement in such cases, where a stream not navigable was the boundary, was always made by lines run from station to station, or monument to monument, selected or fixed on the bank, and that an approximation to the entire quantity embraced by a line running in the center of the stream was thus obtained: *Cockrell* v. *McQuinn*, 4 B. Monroe, 61; *Bruce* v. *Taylor*, 2 Marsh, 61; *Cold Spring Iron Works* v. *Inhabitants of Tolland*, 9 Cush. 492.

We are clearly of opinion that the Capitancillos creek is the true boundary between the land of the respective parties, each owning to the center of the stream. We therefore find for the plaintiff, and judgment must go in its favor accordingly.

1. Agreement so construed as to give exclusive right to occupy land for the excavation of coprolites: *Roads* v. *Trumpington*, L. R. 6 Q. B. 56.

2. Occupation under an agreement for a lease amounts to more than the possession of mere licensee: *Jones* v. *Reynolds*, 4 Ad. & El. 805. The same as to oil lessee: *Kitchen* v. *Smith*, 101 Pa. St. 452.

3. But prospecting does not amount to occupation: *Jones* v. *Reynolds*, 7 Car. & P. 335.

See POSSESSION.

HAIL ET AL. v. REED ET AL.

(15 Ben. Monroe, 479. Court of Appeals of Kentucky, 1854.)

[1] **Recovery of oil taken by trespasser.** The severance of oil from the freehold does not divest the title of the owner nor deprive him of his right of immediate possession, nor prevent his recovery of the oil so taken by action of replevin, or of its value from the one who took it from the well.

[2] **Property in oil as a fluid.** Oil discovered in a well sunk by the owner of the land is his exclusive property, whether drawn from an underground *current* of oil or found standing; and the case is not analogous to the surface owner's right in running streams of water.

Oil extracted by a wrongdoer out of the owner's well remains the property of the owner.

The facts of the case are stated in the opinion of the court.

J. S. GOLDER, for appellants.

J. F. BELL and THOMAS E. BRAMLETTE, for appellee.

Chief Justice MARSHALL delivered the opinion of the court.

This action was brought by Hail and two others to recover from Reed and Alexander three barrels of American oil, each containing forty gallons, worth $1.25 per gallon, of which the petition states that the plaintiffs are the owners, and entitled to the possession, and that they are in the possession of the defendants without right, and illegally detained by them. By a proper affidavit filed with the petition, the plaintiffs obtained a writ or order for the delivery of the property, under which the three barrels of oil were delivered to them on their executing the required bond to return them, etc., according to the result of the action.

The defendants in answer state: 1, That the oil was, by their labor and at their expense, taken from a well which was part of a freehold, and which oil was attached to the freehold and constituted part of it till drawn and severed therefrom by the defendants, who placed it in their own barrels, being the

[1] See *Green* v. *Ashland Co.*, 13 M. R. —; *Briggs Co.* v. *North Adams Co.*, 12 Cush. 114, *Post* TROVER; *Golden* v. *Glock*, 57 Wis. 118; 46 Am. Rep. 32.

[2] *Dark* v. *Johnston*, 9 M. R. 283.

same oil claimed by the plaintiffs; and, 2, they say they had possession of three barrels of American oil, which, by their labor and at their expense, had been drawn from a well, bored down to a running stream of oil, which the plaintiff had never reduced to possession, but was a vague and fugitive stream, not confined or in the possession of the plaintiffs, and the defendants took, at their own expense, from the stream, the oil in the petition mentioned, and barreled it in their own barrels, and had it in their own possession without wrong, and as of their own property, etc. The first of these defenses seems to be founded upon the idea that as the oil was once a part of the freehold, though it became personalty by being severed, an action could not be brought for it in that condition, even by the owner of the freehold. The reason for such conclusion is not stated. But it may be presumed to have been either because the oil was supposed not to continue to be the property of the freeholder after severance by a stranger, or because the stranger by severing it and placing it in his own barrels, became the owner. In this defense the peculiar nature of the oil, and the question whether there is or can be any peculiar and individual property in it until severed, and confined or appropriated, are not brought into view. The defense rests upon the fact that the oil was a part of the freehold, and was taken therefrom by the labor and cost of the defendants, and placed in their own barrels. The simple question upon this ground of defense seems to be, whether the owner of the freehold may recover specifically that which was once a part of his freehold, but which has been wrongfully severed, or whether the substance thus severed becomes the property of the wrongdoer, because he has been at the trouble and expense of severing it and carrying it away in his own vessels or vehicles. In such case the labor and expense are not bestowed upon the thing itself, but in acquiring the possession of it and in committing the wrong. And there can be no pretense that on this ground the right or property in the thing is changed. It is stated by Chitty (1 Pl. 147) that the action of trover is confined to the conversion of personal chattels, and does not lie for fixtures *eo nomine*, or for injuries to land. But if after severance from the freehold, as in case of trees or fixtures, or earth, the property severed be taken away,

or if coals, dug in a pit, be afterward taken away, trover may be supported. And in p. 148 it is laid down that to support this action the plaintiff must have a complete property, general or special, in the chattel, and also the actual possession, or the right of immediate possession of it; which right of immediate possession is presumed to be with the general owner, and as matter of law is drawn to the ownership, unless the owner has otherwise disposed of it, and which therefore exists in ful force against the wrongful taker, until barred by time or contract. This is too well settled to require a citation of authority. The principles which have been stated show that although the severance of a part of the freehold changes that part from realty to personalty, it does not divest the freeholder of his right of property and ownership, nor of the consequent right of immediate possession. And this ownership and right of immediate possession, which will sustain an action of trover, will also sustain an action of detinue. (1 Chitty's Pl. 122.) Or if the taking be wrongful, an action of replevin. (Ib. 163.) And they will therefore sustain the present action, whether it be regarded as in the nature of detinue or of replevin. The second ground of defense relies upon the fact that the oil was taken from a well bored down to a running stream of oil, which was vague and fugitive, and had not been confined nor ever reduced to possession, nor even in possession of plaintiffs. And in support of this ground we are presented with a very ingenious argument, founded on the principles laid down by elementary authors with respect to water, which Blackstone (Vol. 2 of Com. side p. 14) says must unavoidably remain in common, susceptible only of a usufructuary property, belonging to the first occupant during the time he holds possession of them, and no longer. Whence it is argued that this oil, being a liquid like water, and flowing, as alleged, in a stream at the bottom of this well, was common to all, susceptible only of a usufructuary property, and that the particular portion of it now in contest belonged to the defendants as the first occupants and appropriators of it.

But it is to be observed that the portion of Blackstone to which reference is made is a treatise upon property in general; that is upon the principles on which the right of property in external things depends, and which he states

especially with respect to water—the broad principles applicable to the subject in its most general aspect, without reference to any distinction or discriminations by which they might be modified. Then, besides, the fact that water is not oil, and that while nature furnishes the former almost everywhere for the common use of man as being a universal necessity, she furnishes the latter, for the most part, only as the result of arduous labor and intricate processes, and but rarely produces it in its perfect state. It is to be remarked that water itself, though found generally running upon the surface of the earth, where it may be obtained for use by merely taking it, and where, being furnished by nature for the use of all who may conveniently use it, it is only to be appropriated by use and for use, yet it is also frequently found under the surface, and obtained or reached at great expense and labor by means of wells, by which it is intended to be appropriated. This discrimination was not made, nor was it necessary for the purposes of the author that it should be made in the general view which he was taking of property in general. The very title of the chapter and the nature of his observations would lead to the conclusion that he was speaking of water as it is furnished by nature for the ordinary use of man, and as it is commonly found running upon the surface of the earth. The very fact that after illustrating the principle of property being founded on occupancy and on labor, by reference to the well made by one of the ancient patriarchs, he takes no notice of wells when he comes to treat of water as a subject of property, shows that he thought only of water on the surface, or that he considered a well by which it might be obtained from beneath the surface as a means of appropriation.

The other authorities referred to, viz., 3 Kent's Com. 438, and 2 Bouv. Instit. 174, treat especially of water on the surface; the first considering the subject under the title of running waters, and showing that he is considering water running over land, and the other treating the subject under the title of watercourses, and both stating chiefly the rights of riparian owners. The latter, however, (2 Bouv. 173,) treats specially though briefly of springs, as to which he says, the owner of land is entitled to all advantages arising from it, and may use a spring found upon it as he does any other property, without

regard to the convenience or advantage of others, and that this right is very different from the right of the owner of an estate through which water flows. What becomes, then, of the common right of all to the use of water in the spring if it may be thus exclusively claimed and used and owned by the owners of the soil? And if the water in a spring found on his land is thus his exclusive property, there seems to be much more reason to say that the water at the bottom of a well which he has by his labor and expense constructed for the very purpose of retaining water in it for his use, and of facilitating the access to it, is his exclusive property. And still stronger is the reason for considering him as the exclusive owner of oil, a peculiar liquid not necessary nor indeed suitable for the common use of man, and for reaching and obtaining which, for its proper uses and for profit, he has constructed a well with suitable fixtures. It is indeed said in the answer, though it is scarcely to be seen in the evidence, that this well is bored down to a stream of oil. But while there are but slight traces even of a seeping of oil through the well, it is neither alleged nor proved that the well presents no obstructions to the stream or flow of oil, or that it does not hold or retain at least a portion of it, for facility in drawing it out. We know that in wells for drawing water it is usual, and where the supply is small, necessary, to sink the well below the point where the water enters it, so that it may be retained there in sufficient quantities for use, and for drawing it up. There is nothing to show that this was not the case in the present instance, and the jury might have so found. But we are of opinion that whether the water or oil is running through the well in a stream or not, that which is actually in the well is, while it is there and subject to be drawn out, though it be there only in passing from one side of it to the other, appropriated by the owner to his own use, and belongs to him when it is drawn out, unless this is done by his license and for another's use. If, as may be presumed, the well is sunk below the point at which the water or oil enters, or if the water or oil, in any quantity, stands in it until drawn out, the evidence of appropriation is still stronger, and the right of the owner more easily established. And in either case the water or oil, if drawn up by a wrongdoer, is the property of the person

entitled to the well, or its exclusive use, and may be specifically recovered; whether the barrel in which the wrongdoer has placed it may also be recovered with the oil, or other barrels should be furnished by the owner, we need not at present decide.

It follows, from the foregoing views, that the court erred in instructing the jury upon evidence which authorized them to find the facts as above assumed; that upon the whole evidence they should find for the defendants.

Wherefore, the judgment is reversed and the cause remanded for a new trial, on principles in conformity with this opinion.

FRENCH v. BREWER.

(3 Wallace, Jr., 346. U. S. Circuit Court, (Third Circuit,) 1861.)

Construction of deeds. In the construction of deeds the technical rules of the English books must be applied—with reference to the ignorance of the American scrivener.

[1] **Construction of oil lease drawn before oil wells were known.** An instrument purporting to be a grant or license to take oil, drawn by an ignorant scrivener, and at a time when the nature or value of the mineral was not known, ought to be construed with reference to the subject-matter, and the knowledge of such subject-matter at the time; and as to its inartificial use of technical language the whole scope of the paper is to be considered.

[2] **Facts preventing preliminary injunction.** A preliminary injunction ought not to issue to prevent the sinking of an oil well, inflicting certain injury upon the defendants while the benefit to the complainant is not clear and his title also uncertain; nor where the wells sought to be enjoined, if meanwhile sunk, would be a benefit to the complainant instead of an irreparable injury.

Bill for an injunction, the case being thus: In the beginning of the present century, a stream was discovered not far from Meadville, in Crawford county, Pennsylvania, upon the surface of which, as of the smaller rivulets running into it, a species of oil frequently flowed; and to such an extent in some places, that when a candle was applied to the surface the oil would ignite and blaze in a lambent flame on the creek

[1] *Thompson* v. *Noble*, 11 M. R. 137.
[2] *Swift* v. *Jenks*, 19 Fed. 641.

itself. The people in the neighborhood of the stream, which was now called "Oil Creek," were aware of this peculiarity of the water; but the population thereabout was sparse in those days, and no great deal of mineralogical science was applied to the subject. The schoolmaster called it a "phenomenon," and this was regarded by the learned as a full and lucid explanation of the matter. The Indians, it is said, had known this peculiarity of the stream, and applied the oil to surgical purposes in the cure of external injuries or sores. The early white settlers used it in the same way, and also for different domestic and farm purposes. It flowed along with the water—on its surface—but the descent of the water being rapid, and the stream itself shallow, the only mode in which the people could get the oil separated from the water was by making little ditches or pits alongside of the creek, and drawing off a certain amount of the water of the stream into them. This being left in a state of stagnation the oil would soon collect in a coagulated form on the surface, when the women would go out, and inserting blankets under the water, raise them and secure the oil, the blankets being porous enough to let the water flow through them, but sufficiently close to retain, till they could empty it, the thicker substance of the oil.

Enough oil was obtained in this way to make it worth while for the farmers and others in the neighborhood occasionally to go through this somewhat laborious process of getting it, but the oil never became in those days a subject of much value or of any commerce. Some time, however, in the spring of 1858—the date is important—a person named Edwin Drake, residing at Titusville, a town on this creek, conceived that the oil must be a mineral substance, some way connected with coal formations, and that it probably came from a great depth below the creek, and through some fissures in the rocky formation from coal strata on the adjoining lands, and therefore that it could be far better got by boring on the lands themselves. His conjecture proved to be right, and led the way to a branch of industry which in five years has in western Pennsylvania, become an immense one, covering whole regions from Lake Erie to the Ohio, with operations in what is now called "Petroleum" or "Rock oil."

In November, 1855—that is to say, two years or more before the discovery and labors of Drake, as thus recorded, the defendants, being then owners in fee of 160 acres of land on Oil Creek, including a certain island particularly well situated for gathering oil in the old way, while the complainants owned 105 acres on the same creek, adjoining this tract of 160 acres, but lower down on the creek than the defendants', made to the complainants a deed, somewhat peculiar in its expression. It ran thus: "The said parties of the first part," (the now defendants) "do hereby lease and by this indenture have leased to the said parties of the second part," (the now complainants,) "their heirs and assigns, for the full term of ninety-nine years, all the oil or paint on or *being on any* of the lands," etc., (of the defendants,) "with the privilege of" —the deed went on rather oddly to say—"of going onto and of taking away all or so much of the oil or paint at any time and at all times, as is consistent with the pleasure or interest of the said parties of the second part, on the following described lands *only*, viz.:" [Here followed a description of certain lands of the defendants.] "Reserving to the said parties of the first part," (that is to say, to the now defendants, who had large mill works near this land,) "their heirs and assigns, the right and privilege at all times to pass over and repass with teams, wagons, sleighs, carts, sleds, or any other vehicle, to and from their mills, over said ground or lands, together with all ground or land necessary for yard and mill privileges and mechanical purposes: And the said parties of the second part, their heirs and assigns," the deed proceeded, "are not in any case to approach with their work or excavations so as to endanger or obstruct in any manner their mills, races, dams and ponds, or to impair or obstruct their lumbering and mechanical business as they do now or may hereafter exist."

It was made plain enough in behalf of the complainants, that between the date of the deed just mentioned and the time of Mr. Drake's discovery, the defendants never attempted to claim any oil on or about this tract of 105 acres—the tract on the upper part of the creek—but that in May, 1860, finding that Mr. Drake had discovered a new mode of getting at the oil, and of making a great subject of commerce out of

it, *they too*, by numerous workmen and under tenants had been sinking wells and carrying away the oil also; *although, as yet, all the oil that they had got had not paid off the cost of sinking the wells.*

The complainants, citizens of Connecticut, who were largely engaged in boring for oil, finding that the defendants were interfering with the monopoly of the substance, which they had got through Mr. Drake's discovery, now filed a bill, praying an account for the oil that the defendants had already got from the 160 acres, and an injunction against taking any more in any way and especially by the process of boring wells. The bill alleged that the complainants had expended large sums of money in the development of the oil on the 160 acres, and of the means and methods of obtaining it from the land, by reason of which the premises aforesaid, and the right and title thereto, and interests therein of the complainants, had been greatly increased in value; so that they were now believed to be worth $100,000 more than before such expenditure and development; that the rights and claims of the complainants were acknowledged until the expenditure was made and the development had resulted in increasing the value. It complained in substance, further, that respondents occupied the 160 acres to the exclusion of complainants, and had excavated and bored numerous wells thereon, and taken the oil therefrom, "*thereby*" preventing complainants from taking and using it, *and preventing the same from oozing and flowing down the creek* from the tract of 160 acres to that of the 105 acres below it and belonging to complainants.

The testimony showed that the respondents had bored wells, and had a large number of hands employed in boring others; but there was no evidence that they had meddled with or sensibly affected the flow of the oil *down the creek*, or the collection of it by complainants, either on their own land or on the island. Nor was there any proof that the oil raised from the upper works flowed in any way, either above or below the surface, to the lands below, of the complainants, or to the island where they were permitted to enter and make pits; whatever might be the inference which a geologist, on looking at the soil, would draw if the wells were very numerous and near to the stream.

CHURCH, for the complainants.

McCALMONT & KERR, for the respondents.

GRIER, J.

The instrument on which this controversy arises is anomalous in character. It is the work of a conveyancer, ignorant of legal forms, and wholly unlearned in law. It does not profess to sell or convey absolutely all the mines of paint or petroleum lying in or under the 160 acres. If it had done so the title to the minerals would necessarily include a right to enter on the land of the grantor to take them away. A lease for years is a contract for the use of land or tenements; and although it may be for a full consideration paid down, and reserve no rent to be paid in future, yet it contemplates a temporary use of the thing leased, whether it be a farm or a mine, and a return of the possession thereof to the owner or reversioner. Suppose it was a lease for one year to "take at all times *so much of the oil as is consistent with his pleasure or interest*," would this confer an absolute title to all the oil whether taken in the year or not? The great and governing rule in the construction of all contracts or deeds is to ascertain the intention of the parties, and this must be by a careful examination of the whole instrument. This is more especially necessary in a country where every man is his own scrivener and freely uses legal terms without a knowledge of their true or precise legal import. It is, no doubt, a just rule of construction that restrictive words, repugnant to an absolute grant or sale of a thing, may be construed to be inoperative, because they contradict the clearly expressed terms of the deed as to the nature and extent of the estate granted, and render it ineffectual for the purpose clearly intended by the parties. But we must first examine the whole instrument, all its parts, and each provision or covenant contained in it, to ascertain the intention of the parties, before this rule can apply. We should ascertain the nature of the thing which is the subject of the grant, and the state of knowledge of the parties. The rules of construction, adopted with regard to leases or conveyances of coal mines or other solid mineral substances,

may have little application to this newly discovered mineral liquid. There would be no necessary contradiction in the terms of a lease of coal mines, that the lessee might take *all* the coal, or so much as he pleased, under a tract of 100 acres, while it prohibited his entry on all but ten acres, for the purpose of sinking the shafts for his mines. It may be true that wells sunk on the 105 acres, or on the island, might or might not drain the oil from the whole 160 acres. As to this fact the parties have furnished no evidence whatever, and it is probably a fact not yet ascertained or known. We must have reference, in interpreting this obscure paper, to the state of knowledge of the parties, and of the whole country, with regard to the subject-matter of this contract and mode in which this mineral oil was obtained. When the instrument was executed, the only method known by which the oil could be obtained was by digging trenches and raising the oil by blankets from the water. The natural flow of the creek would carry the oil on its surface from the land of the respondents to those of the complainants, which were lower down, unless the oil was arrested above. That part of the 160 acres called the island was conveniently situated for making the trenches, to gather the oil as it came down. Recalling, as the reporter's statement gives it to us and as the affidavits disclosed it, the knowledge of the parties and the people on the subject of this contract, and the fact that till the time of Drake's discovery the oil had found its way to the surface through chance fissures in the strata under the stream, and that it was not till 1858 that boring to find the source of the oil was practiced, much of the difficulty in the construction of this instrument, by reason of apparent contradiction in its covenants, vanishes. It is not necessary, however, nor perhaps proper, to express any conclusive opinion as to the construction and effect of this instrument before the final hearing. It is sufficient, for the purpose of the present motion, to say:

1. That it is, at least, doubtful whether the complainant's deed conveys in absolute estate all the oil under the respondent's lands, or only a license for a term of years to collect what flowed on the surface of Oil creek; or whether parties could be said to contract about a subject-matter of which both were wholly ignorant. *Caldwell* v. *Fulton*, 7 Casey, 479,

cited by Mr. Church, has no similarity to the present. It is no doubt true that minerals beneath the surface may be conveyed as corporeal hereditaments, and thus severed in title from the surface soil; and there is no doubt that livery of seizin is unnecessary, either here or in England, since the statute of uses and the introduction of deeds of bargain and sale. But it might nevertheless be sufficient reason for construing an instrument to take effect as a grant of an incorporeal hereditament, which requires no livery of seizin, that it contains no apt technical words to grant, bargain or sell absolutely, a corporeal hereditament, or an unsevered portion of the grantor's land.

Since that decision, a court administering the law of Pennsylvania might be justified in construing a grant of "the full right, title and privilege of digging and taking away stone coal to any extent" from the land of the grantor, as an absolute bargain and sale of the coal to the grantee. But we must construe the deed before us *ex visceribus suis;* having reference to the peculiar nature of the subject-matter and the knowledge of the parties with regard to it. With these facts in view, it is at least doubtful whether the parties intended by this anomalous instrument to grant anything more than a license for a term of years to take all the oil floating down the creek, and to use the island for that purpose, in consideration of the grantees' license to them to have a mill race over their land. A final decision of this question must be reserved till a final hearing of the case.

2. There is no evidence to support the charge of the bill that wells bored by the respondents prevent the oil from flowing down the creek, or that they have interfered in any way to arrest such flow or hinder the enjoyment of any of the complainants' rights on the island. We do not know, and are not informed by the pleadings or evidence, that the oil taken from the rocks above would ever have flowed (above or below the surface) down to the island, or to the one hundred and five acres below.

3. The oil taken by defendants thus far has not compensated the expense and trouble of boring the wells. An injunction now would compel the respondents to cease their business and discharge a large number of hands. It would inflict a certain

injury on the respondents, while the benefit to the complainants, like their title, is uncertain. If they recover on final hearing, the new wells will be a benefit to them, and not an irreparable injury.

Injunction refused.

FORSYTH ET AL. v. THE NORTH AMERICAN OIL CO.

(53 Pennsylvania State, 168. Supreme Court, 1866.)

Strict interpretation of contract affected by loose observance of both parties. The defendants contracted to deliver to the plaintiffs a quantity of oil, "to be paid for in lots as delivered, the delivery to be commenced immediately and pursued with all due diligence till completed." Both parties having taken great latitude in delivery and payment, without manifesting an intention to hold each other to a strict performance, it was *held* no error to instruct the jury that the defendants, upon a payment not being made on demand, could not rescind the contract without warning the plaintiffs of their intention to insist on a literal compliance.

Idem. If the contract had been previously performed literally, and the plaintiffs had refused payment, the defendants might have rescinded the contract.

Tender waived. The refusal of the defendants to deliver the oil, excused the plaintiffs from tendering payment.

[1] **Oil barrels; what measure intended.** A contract for so many barrels of a liquid is presumed to be made on the basis of the statutory number of gallons in a barrel; but where there is evidence that barrels of a different content were in contemplation of the parties, it is proper to leave the question to the jury.

Error to the Court of Common Pleas of Allegheny County.

This was an action of assumpsit, commenced December 12, 1863, by the North American Coal Company against William H. Forsyth, Henry Forsyth and Jacob Forsyth, trading as Forsyth Brothers & Co., for failing to deliver a quantity of oil under the following contract:

"PITTSBURGH, July 16, 1863.

"Purchased of Forsyth Brothers & Co. four thousand (4,000) barrels good merchantable crude oil, to be delivered,

[1] *Cullum* v. *Wigstaff*, 2 M. R. 573.

in their barrels, on board cars of Allegheny Valley Railroad, and paid for by us in lots as delivered, at the rate of twenty cents per gallon for the oil. The barrels to be returned. The oil to be pumped free from water, subject to our inspection, and gauged in the barrels. The delivery to be commenced immediately, and pursued with all due diligence until completed. The gravity of the oil to be 40° to 44°.

"Accepted. FORSYTH BROTHERS & Co."

The plaintiffs' works were about twenty-eight miles from Pittsburgh, the defendants' about three miles; the counting-rooms of both parties were in the city, a few squares apart. There was evidence that an agent of the plaintiffs went to the defendants the day after the contract for oil, and on the two succeeding days, and got none; that he got some on the fourth day, and that frequently afterward when he demanded oil, received none, the defendants assigning various reasons, once that they were filling an order for Pennock & Co., occasionally for want of barrels, that they were short of hands, etc. The defendants, by their account furnished, delivered to the plaintiffs, between July 20th and September 10th, 1863, twenty-five lots of oil, stated to be "2794 barrels—111,738½ gallons"—the first bill being as follows:

"PITTSBURGH, July 20, 1863.

"North Am. Oil Co.

"Bought of Forsyth Brothers & Co.

"131 Bbls. Crude Oil, as per certificate, 5263½ gal-
"lons, at 20c.....$1,052.70."

The other bills were in the same form, but of different amounts. The defendants paid, on July 31st, August 4th, 17th, 21st and 31st, 1863, in full, for all the oil delivered up to the last date. The bills were made out from the United States gauger's certificates, presented with the certificates to the plaintiffs' secretary, generally left with him to look over, and the money called for the next morning. On the 10th and 12th of September, four bills, amounting to $4,058.60, and one amounting to $1,038.80, were left at plaintiffs' office. The defendants' clerk called two or three times for the money and was told to come again; that there were "no funds on hand." He afterward met the secretary in the street, and asked him

to go to the office and sett'e the bills. Upon the clerk insisting, the secretary refused; said he hadn't the money, and if he had he would not pay that day.

On the 14th September this notice was served on the secretary:

"PITTSBURGH, Sept. 14, 1863.

"GEORGE OGDEN, ESQ.,
"Sec'y North American Oil Co.

"*Dear Sir:*

"As you have, by your refusal to make payment when demanded, failed to comply with the conditions of our contract with you, dated July 16th last, and have thereby rescinded the same, we hereby give you notice that we shall not deliver you any more crude petroleum under said contract.

"Yours, respectfully,
FORSYTH BROS. & Co."

The secretary on the same day went to defendants' office, and asked one of them what he was going to do about filling the balance of the contract. "He asked if I would pay the balance that we owed him. I said I would not unless he would fill the balance of the contract. He said he would not. I remarked we would try to find a way to make him fill his contract." On the 14th of September the plaintiffs paid $4,058.60 in full of all the bills but the last, and on the 15th they paid $1,038.80 in full of the last bill: the secretary testified that he had not seen the last bill till after he had paid the others.

An agent of the plaintiffs testified:

"I went out one day in September and asked Mr. Forsyth for oil, and he told me that I could get no more oil on the old contract. He pointed to two tanks in the yard, and said, if you find your own barrels and your own labor, you can have the oil. I told him I had to go to the office, in town, and report. He said the old contract was broken, and he would not give me any more oil on it. I went out twice afterward, and made the same demand for oil. Got no oil on these occasions. He always said the same thing, that we could get no more oil on that contract. That oil was gone up 26 cents, and they were losing by it, and that the company had not

stuck to their contract. He gave these as his reasons, and never gave me any more oil. The last times he never said he would give oil on the old contract, on any conditions."

Both the plaintiffs and defendants submitted a number of points. The part of the charge given sufficiently indicates the questions ruled, without giving the points and answers in detail.

In answer to two of the defendants' points, Mellon, A. J., charged:

"It is for the jury to say, under the evidence, what barrels the parties in their contract had reference to; whether the statutory barrel, or barrels specifically adverted to and intended to be filled with oil 'as packages.' The evidence in regard to it is the written contract, interpreted in view of the subject-matter that it had reference to as barrels.

"There is evidence in the contract that some particular barrels used by the parties were intended to be used. This, and the interpretation given to this part of the contract by the parties themselves, so far as they performed the contract in the use of and estimation, as to the contents of barrels, is some evidence for the jury."

The court further charged:

"To find for the plaintiffs you must be satisfied, by the evidence, that the plaintiffs were ready and willing, in good faith on their part, to perform the contract, so long as the defendants stood by it; that they were ready and willing to receive and pay for the oil in lots as delivered on the cars, according to the terms of the contract; and that they were to do so promptly, unless they have shown some valid excuse for tardiness. The alleged excuse for the want of promptness in payment on plaintiffs' part, for lots delivered, is in the mode of performance adopted or acquiesced in on both sides. Mutual convenience mostly regulates the manner of performance of contracts, where the contract contemplates subsequent acts to be done by both parties. Where the mode of performance discloses a relaxation of strict legal right, as, for instance, if the defendants should delay the delivery of the oil from time to time, or deliver in smaller lots or at longer intervals than the contract contemplated, and the vendors acquiesced in it without other manifestation than occasional com-

plaint and frequent demand for delivery, or upon delivery the vendees neglected payment till dunned frequently by the vendor—whilst such mode of performing a contract of the kind existed neither party could suddenly throw himself on his legal rights and declare himself off. This would be taking an undue advantage of the other, who might not have suspected any such intention. Some reasonable notice of such intention to rescind must be given under these circumstances; but whether such were the circumstances in the present case is for you. Under such circumstances notice from the one party to the other that the contract was rescinded amounted to nothing, as it afforded no time or opportunity for the party notified to regain his position. If, under the alleged circumstances, the notice had been to the effect that, not having paid for the last lots of oil delivered, no more would be delivered till they were paid for, and unless paid for soon the contract would be at an end, and the vendees had neglected such notice, the legal effect would be very different from that of a notice, to the effect that not having paid, the contract was rescinded and at an end. Yet the circumstances of neglect or inability to pay on the part of the vendees might be so gross, even where a lax mode of performance was acquiesced in, as to excuse the other party from any notice whatever of an intention to rescind, and might enable him to consider the contract as ended. It is only where there is a relaxed or indulgent mode of performance acquiesced in for a time between the parties, and they are still going on in good faith and ability to fulfill the contract, that reasonable warning must be given before the contract can be annulled. How the facts are in the present case is entirely a question for the jury under the evidence."

The verdict was for the plaintiffs for $3,229.67.

The substance of the errors assigned is stated in the opinion of Judge Agnew.

SHIRAS, for plaintiffs in error.

MACCONNELL & WOODS, for defendants in error.

The opinion of the court was delivered November 1, 1866, by AGNEW, J.

This case presents three principal questions, the decision of which will dispose of all the assignments of error. I shall not discuss them in the order of the argument, but will notice first the question of rescission, as it bears directly on that of readiness and willingness to comply with the contract after the attempted rescission.

The notice of rescission, dated and delivered on the 14th of September, 1863, was absolute, and was founded on an alleged refusal to pay on demand for the oil theretofore delivered. Had the contract been performed literally according to its strict terms before this time, and the plaintiffs had actually refused payment, it could scarcely be denied that the defendants might have availed themselves of this refusal, to escape from a losing contract, which they obviously desired to avoid. But the evidence shows that both parties had taken a great deal of latitude in its performance, without manifesting any intention to hold each other to a strict and literal performance. Although the delivery of the oil was to be commenced immediately by the defendants they did not begin to deliver until several days had elapsed and the plaintiffs had made four demands for it. After they began the evidence is also clear that they did not deliver in the quantities required by the plaintiffs, and were even guilty of a breach of their contract, by compelling them to wait for further delivery until they had filled an order for Pennock, Ball & Co.

The oil was to be paid for on delivery in their own barrels on the cars, pumped free of water, subject to inspection, and gauged in the barrels; yet, though inspected by the plaintiffs' agent, the bills were not made out and gauger's certificates furnished on delivery; nor was the money demanded, the amount of the delivery being unknown until the bills were rendered and gauger's certificates produced. This was done at the office of the plaintiffs in this city, thirty miles distant from their works, thus necessitating the sending of the bills and certificates to the works for verification by the actual delivery. No doubt, practically, it was very inconvenient, perhaps scarcely possible, to perform the contract literally on either side, and therefore, by mutual consent, its terms were liberally interpreted in their practice. When the notice of rescission came it fell upon the plaintiffs like a sudden thunder-

clap. It was founded, too, upon an alleged refusal to pay on demand, a matter more seeming than real. True, young Ogden, the secretary, had become petulant, in consequence of what he considered the annoying conduct of young Howard, and rashly said in the streets he would not pay; but the real intention of the company itself to pay is shown by the actual payment on the same day the notice was served for all the oil known to be delivered, and on the following day for the remainder, the bills of which had escaped observation. This was followed by repeated demands for more oil under the contract, which the defendants absolutely refused to deliver.

Under these circumstances we discover no error in leaving it to the jury to determine the facts as to the mode of performance adopted by the parties, including the want of promptness in payment, alleged as the ground of rescission; and in instructing them that after a liberal indulgence allowed on both sides the defendants could not suddenly rescind without a fair warning of their intention to insist upon a literal compliance with the contract *in futuro*. The contract then being still in force, as the finding of the jury on the facts evinces, the evidence to show the intention and readiness of the plaintiffs to comply with the contract was sufficient to go to the jury. Indeed, it is difficult to perceive how the evidence could be required to prove more, in the absence of any warning from the defendants of their dissatisfaction with the prior loose mode of performance, and of their intention to require a literal and strict performance thereafter. On the very day of the attempted rescission, and the day following, the plaintiffs paid up all they owed, and demanded fulfillment of the contract by the defendants. This was met by an unqualified refusal to deliver on the contract. Since, the demand was made at their works, and once at their office in the city, and as often peremptorily refused. The defendants did not call for immediate payment on delivery, but refused to deliver at all, on the ground that the price of oil had risen, and they were losing money on this contract. It was clearly not a question of literal performance in future, but a denial of obligation altogether, and a refusal to stand on the contract for a reason found by the verdict to be insufficient. Not only was the contract one in which it was impossible for

the plaintiffs to make a tender of money until delivery on board of the cars in quantities ascertained by gauging, so as to determine the sum to be tendered, but the refusal of the defendants to perform at all excused the tender if necessary. The court was therefore justified in refusing to charge that the evidence was insufficient, and in submitting to the jury the question of the plaintiffs' willingness and readiness to pay and otherwise to comply with the terms of the contract. We think, also, that there was no error in leaving it to the jury to say, under the evidence, to what barrels the contract had reference—whether the statutory or the customary. It is not denied that a contract of parties for so many barrels of oil or other liquid is to be presumed to be made upon the basis of the statutory number of gallons, if there be nothing on the face of the writing to show the contrary. But here the contract not only refers to barrels of good merchantable crude oil, but requires the oil to be delivered in the barrels of the defendants, and that these barrels shall be returned. The natural and evident interpretation of the contract is, that the barrels meant are the same in quantity as those which belonged to the defendants—for these are the barrels to be used in the delivery, to be gauged and to be returned. Now when nothing whatever in this writing indicates a difference between the barrels of purchase and those of delivery, it is asking us to go very far to say that the parties meant the purchase to be governed by the statutory number of gallons, while the delivery should be in the customary oil barrels, and that these should be gauged and returned. It is very clear from the evidence that the customary oil barrel contains forty gallons, and that these were the barrels used by the defendants in their business.

There was no error, therefore, in thus leaving the case to the jury.

Judgment affirmed.

MAUTE v. GROSS.

(56 Pennsylvania State, 250. Supreme Court, 1867.)

Misrepresentation defeats stipulation. Evidence is admissible to show that a material stipulation in a written agreement was founded on the misrepresentations and fraud of one of the parties.

[1] **Oil sold by sample.** The plaintiff agreed to deliver to defendant oil of a specified quality in payment of a judgment, and produced a sample in a bottle, which he assured the defendant was of the quality. A written agreement was then drawn for the delivery of "oil of the quality of the sample." Certain oil was delivered. *Held*, that the defendant might show that the oil was not of the quality the plaintiff agreed to deliver.

Idem—Fraud. The court charged that in a sale by sample, "where the adoption of a sample had been fraudulently procured, the party who has practiced such fraud should not complain if he is denied any advantage of his wrong." *Held*, not to be error.

Error to the Court of Common Pleas, Allegheny County.

The proceeding in the court below was a feigned issue on a judgment, in which Jacob A. Maute was plaintiff and George Gross defendant. On the 10th of May, 1866, a suit was pending between the parties in the case. On that day Maute, who was defendant, withdrew his affidavit of defense and confessed judgment to Gross for $1,050, with stay of execution for fifteen days from the date. At the same time the parties entered into the following agreement:

"And now, May 10, 1867, the defendant having confessed judgment to the plaintiff in the sum of $1,050 and costs, with stay of execution for fifteen days from this date, the plaintiff, in consideration thereof, agrees to accept and receive from said defendant, at defendant's manufactory in Ross township, sixteen barrels of good lubricating oil, of the quality of a sample this day placed in the custody of J. F. Slagle, Esq., in full payment of said judgment, if delivered within fifteen days; said oil so delivered or tendered shall operate as a satisfaction of the said judgment, except the costs; and upon delivery of said oil and the payment by the defendant of said docket costs, the plaintiff agrees to enter satisfaction upon the record of said judgment. The oil to be delivered in barrels, and the barrels to be returned to defendant."

[1] *Davis* v. *Henry*, 6 M. R. 680.

On the 1st of June Gross issued execution on the judgment. On the 2d of June Maute obtained a rule to show cause why the execution should not be set aside and the judgment marked satisfied. The rule was afterward discharged, and an issue, in which Maute was made the plaintiff and Gross the defendant, was ordered to try "whether fraud and deception had been practiced on defendant in substituting a different kind of oil as a sample for that which was agreed upon." On the trial the issue was amended by adding the question whether the judgment had been paid.

It appeared from the testimony of Maute's witnesses that he delivered sixteen barrels of "Smith's Ferry crude oil" at G. Maute's store about the middle of May and that Gross directed where it should be put; that the oil delivered was worth about 16 cents per gallon. It was admitted that the oil delivered was the same as the sample deposited with Mr. Slagle.

Under objection and exception Gross gave evidence by S. M. Ott, that when the suit was pending between the parties in May, 1866, at the instance of Maute he proposed a compromise. Witness further testified: "The parties agreed to compromise for certain oil, to be delivered; lubricating oil of Maute's own manufacture; no particular quality of lubricating oil; there were conversations about the House of Refuge, Lake Superior Iron Works, and the several establishments Maute had been accustomed to deliver oil at; Maute said the oil was worth $60 to $65 per barrel; I was not present when the matter was closed up; Maute was engaged in the manufacture of oils; his works were down at Wood's run; * * * it was the understanding all around that it was to be Maute's own manufacture; that it was understood that it was to be of the value of $65; I asked Maute what his oil was worth, and he said it was worth from $1.25 to $2 a gallon. I have a distinct recollection that the oil was to be an equivalent for the judgment, $900 to $1,000."

Gross also examined J. F. Slagle, Esq., who, under objection and exception, testified:

"At the time the case was on for trial, on the 9th May, 1866, there was an offer of compromise made; the offer was to give fifteen barrels of lubricating oil; I understood it to be lubricating oil of Maute's manufacture. The agreement was finally that the oil should be delivered as soon as Mr. Maute

could make it; it was the understanding that the oil should be of the quality delivered to the House of Refuge. We then went to Mr. Brown's office for the purpose of closing the matter up. Mr. Brown, Maute, Gross and I went to Mr. Brown's office.

"We agreed to take a judgment for $1,050 against Maute, with stay and execution for fifteen days, and to enter into an agreement to satisfy the judgment if Maute delivered sixteen barrels of oil in fifteen days, according to the contract. Mr. Brown wrote out the confession of judgment, and commenced writing the articles of agreement. After writing a portion of it he asked how the oil was to be described. I told him to call it good lubricating oil, and I think I added, of Maute's own manufacture. Maute said there may some question or difficulty arise as to the quality of the oil to be delivered and I would rather have a sample. Mr. Gross said: 'There need be no difficulty; just give me such as you gave the House of Refuge.' Mr. Brown, I think, suggested that it would be better to have the sample. I objected that Mr. Maute could not get the sample in time; that the matter must be closed that evening in order that we should know whether to bring back our witnesses or not. Mr. Maute said there was a man down town to whom he had given some of that oil, and he thought he could get it in a few minutes; started away and said he would be back in a few minutes. He returned in a short time with this vial of oil. In the meantime Mr. Brown had written the agreement which was afterward signed. Maute said, 'The man I went to see was not in, but I found some at another place of a little better quality.' Mr. Gross took the bottle and looked at it, and remarked, 'I don't think that is very good.' Maute replied, 'There, that is what I told you; if he (Gross) would not be satisfied with that, he would not be satisfied with anything.' Maute said, 'This (referring to the sample) is the best oil I make, and it is worth $1.80 per gallon,' to which Mr. Gross replied, 'May be it is right, and I will take it.' The article was then signed and Maute said he would deliver it as soon as he could get it ready. Mr. Brown advised him to do it at once. The article was drawn up referring to sample before the sample was brought in. The agreement was drawn up and signed on the 9th. It was dated

the 10th so as to correspond with the judgment, which was to be entered in open court the next day, the 10th. The agreement for confession of the judgment, and agreement for delivery of the oil in satisfaction of the judgment, were executed at the same time—were regarded as one transaction. It was understood that the standard was to be the sample. The sample was placed in my care. Before we left the court house the arrangements as to the number of barrels of oil, time of delivering, quality and kind of oil was made. It was agreed that the oil should be delivered at Maute's place in two weeks. The parties were brought together by Mr. Ott. Maute said he would deliver the oil as soon as he could manufacture it."

Gross also gave evidence that he served a written notice on Maute that he would not receive the oil, as it was not the quality he was to get, and told Maute also that the barrels were not full.

The plaintiff, Maute, submitted a number of points to the court, which, with their answers by Sterrett, P. J., are as follows:

1. Where goods are sold on inspection there is no standard but quantity, and no warranty other than that the identical goods sold shall be delivered, and when personal property is sold by sample the same rule prevails.

Answer: "As a general proposition this is correct, but you should determine from the evidence whether the sample was introduced by Maute and falsely represented to be of his own manufacture, and whether Gross, relying not on his own judgment from inspection, but relying on the declaration and representation of Maute, agreed to adopt the sample as a test of the kind of oil they have agreed upon. If you find such to be the fact your verdict on this point should be in favor of Gross."

2. Where property is sold by sample the sample, and not the name, or other description by which the property is designated, is the sole standard by which the property is to be tested.

Answer: "This proposition is correct. But where the adoption of a sample has been fraudulently procured the party who has practiced such fraud should not complain if he is denied any advantage of his wrong. The fact, or one of the

facts which you are to determine from the evidence is whether fraud or deception was or was not practiced by Maute in procuring the adoption of the sample in question."

3. The test as to the kind and quality of the oil which Maute agreed to deliver to Gross is the sample placed in the custody of J. F. Slagle, Esq., defendant's attorney, and if the jury believe from the evidence that the plaintiff delivered to the defendant, within the time fixed by the written contract, sixteen barrels of oil of the kind and quality of said sample, the jury should find in favor of the plaintiff, Jacob A. Maute.

Answer: "This proposition is affirmed, provided you find that the adoption of the sample in question was not fraudulently procured by Maute."

4. It is immaterial whether the oil delivered by plaintiff to defendant was or was not lubricating, or manufactured oil, provided that it was oil of the kind agreed upon by the parties and identified by the sample, being in kind the same as the sample.

Answer: "This point is affirmed with the qualification contained in the answer to the 1st, 2d and 3d points."

5. The parol evidence offered by defendant is not sufficient to set aside the written agreement given in evidence.

Answer: "This point is refused. The issue we are trying is to determine certain facts for the information of the court. How these facts when determined by you may be applied is a matter we will not now consider. If the transaction as to the production and adoption of the sample was fraudulent on the part of Maute, as alleged by the other party, it is competent to show that it was by parol evidence."

6. That if the defendant is entitled to recover in this issue the rule of damages is the difference between the value of the oil delivered and the market value of good lubricating oil at the time fixed for delivery.

Answer: "This point is refused. Unless you find that Gross accepted the oil claimed to have been delivered he was not bound to accept any other kind of oil than that agreed upon. But if Gross accepted or received any oil from Maute the latter should have a credit on the judgment to that extent."

The defendant's point and the answer of the court were:

If the sample furnished by Maute was represented as lubricating oil of his own manufacture, and was so understood by Gross at the time he signed the agreement, and if the sample was not of his manufacture and was known by Maute not to be of his manufacture, and if the oil delivered to Gross was of the same kind as the sample but inferior in price and quality to lubricating oil of Maute's manufacture, then he was guilty of a fraud, and the verdict of the jury should be for defendant.

Answer: "If the jury find that Gross relied upon the representations of Maute, and not upon his own judgment, the point is affirmed, with the qualifications contained in the general charge."

The verdict was for the defendant in the issue, and the court directed the sheriff to proceed with the execution.

Maute took out a writ of error, and assigned for error: dismissing the rule to set aside the execution; directing the issue to try the question of fraud instead of the question whether Maute had performed his contract; directing the sheriff to proceed with the execution; admitting the evidence of Ott and Slagle, and the answers to the points.

J. BARTON, for plaintiff in error; cited *Rick* v. *Kelly*, 6 Casey, 529; *Roth* v. *Crissy*, Id. 145; *Summers* v. *Ritchie*, note to Id. 147; *Weimer* v. *Clement*, 1 Wright, 147; *McFa land* v. *Newman*, 9 Watts, 55; *Carson* v. *Baillie*, 7 Harris, 375; *Lord* v. *Grow*, 3 Wright, 88; *Fraley* v. *Bispham*, 10 Barr. 320; *Wetherill* v. *Neilson*, 8 Harris, 448; *Mathews* v. *Hartson*, Pitts. Leg. Jour., Sept. 15, 1867.

J. F. SLAGLE, for defendant in error; cited *Stauffer* v. *Young*, 3 Wright, 455.

The opinion of the court was delivered November 14, 1867, by THOMPSON, J.

The exceptions in this case arose on the trial of an issue ordered by the court below to try "whether fraud and deception had been practiced on the defendants, in substituting a different kind of oil as a sample, for that which was agreed

upon," and "whether judgment No. 452, March term, 1866, had been paid."

The testimony objected to by the plaintiff in error and plaintiff in the issue was not offered to enlarge, contradict or alter the instrument of writing of the 10th of May, 1867, between the parties, but simply to show that a material stipulation therein was founded on the misrepresentation and fraud of the plaintiff. This was proper. Fraud in a contract could never be proved if its terms were held to preclude all other evidence in regard to it. A fraudulent scrivener might, if such a rule prevailed, write a very different contract from that agreed upon by the parties; and if they affixed their signatures to it the fraud would be an accomplished fact. It is too well settled that this is not the rule to justify any reference to authorities.

The fact seems undisputed that the oil which the plaintiff agreed to deliver to the defendant in payment of the judgment was to be oil of his own manufacture, of the kind that had been furnished by him on former occasions to the House of Refuge, and to the Lake Superior Works in this city.

When the contract was being reduced to writing the scrivener inquired how he should designate the oil. After some conversation the plaintiff proposed to procure a sample from a party who he alleged had some of his oil, and left for that purpose. He returned in a short time with a bottle containing oil, which the defendant remarked did not look like the oil he had seen of his manufacture. The plaintiff replied it was, and referring to the sample said it was the best he made, and worth $1.80 per gallon. The agreement had been written referring to the sample, while plaintiff was absent. After this conversation the parties signed the agreement. The testimony objected to showed all this and that the sample was not of manufactured, but of crude oil, worth not over sixteen cents per gallon, instead of $1.80 as represented. Supposing that the writing closed the door against inquiry, the plaintiff, within the time stipulated, delivered the number of barrels of oil agreed upon according to the sample, and claimed a satisfaction of the judgment, which was to be paid in oil. If these facts were true, and the jury have found they were, it would be a very deficient system of jurisprudence which would for-

bid them to be proved. They went directly to establish a most unmitigated trick and fraud. No such system exists here. The testimony was very properly admitted.

There are numerous assignments of error to the charge, and they principally relate to the law of sales by sample. The court was requested in the plaintiff's second point to charge that "when property is sold by sample, the sample and not the name or other description by which the property is designated, is the sole standard by which the property is to be tested."

The answer of the learned judge to this was all that the law required, and was sufficient for the case. He said: "This proposition is correct. But when the adoption of a sample has been fraudulently procured, the party who has practiced such fraud should not complain if he is denied any advantage from his wrong. The fact, or one of the facts, which you (the jury) are to determine from the evidence is, whether fraud or deception was or was not practiced by Maute in procuring the acceptance of the sample in question."

The question was thus fairly left to the jury on the very point in issue, and was found in favor of the defendant. The jury also found that the defendant's judgment was not paid. There was no error, therefore, in permitting execution to go on the judgment.

The charge was right also in answer to the plaintiff's sixth point. The defendant was not bound to take in payment of his judgment what he never agreed to take. If a different kind of oil was delivered from that agreed to be received, and the plaintiff refused it for that reason, although he may have added others, it was not a credit or payment. Whether he accepted or refused, it was left to the jury with proper instructions looking to either event. The court was right in directing the issue, and in all their rulings on the trial.

Judgment affirmed.

THE ARDESCO OIL CO. v. RICHARDSON ET AL.

(63 Pennsylvania State, 162. Supreme Court, 1869.)

Repair of oil tank. A company leased a leaking oil tank, made with iron sides and wooden bottom. the lessee agreeing, in lieu of rent, to put it "in perfectly good repair." This did not require more than putting it in as good condition as it could be made with a wooden bottom.

"Repair" means to restore to its former condition, not to change either the form or material.

Admissions by corporate officer. Evidence of declarations of the president of the company that the cost of repair would not exceed $500 was admissible for the purpose of showing that the parties did not intend an iron bottom, which would cost several thousand dollars.

Presence of officer. Evidence that the president was present whilst the repairs were going on, and expressed his satisfaction with them, was admissible.

Extent of repairs. Evidence of the amount expended in making the repairs was admissible as pertinent to the question of the breach of contract and as to damages.

Error to the District Court of Allegheny County.

The Ardesco Oil Company, on the 31st of January, 1868, instituted an action of assumpsit against Samuel Richardson and Theodore E. Tack for an alleged breach of a contract, of which the parts material to this case are as follows:

"Articles of agreement, made this 22d day of January 1866, between The Ardesco Oil Company of the first part, and Samuel Richardson and Theodore E. Tack of the second part, witness: That the said party of the first part hereby lease and let to the said parties of the second part, one iron tank, situated on the premises of the Ardesco Oil Company, in McClure township, Pennsylvania, for the purpose of storing crude petroleum — the capacity of said tank being about 13,000 barrels, more or less—for the term of two years, from the 22d day of January, 1866; and in lieu of rent, the parties of the second part agree to put the tank in perfectly good repair, and to leave it in the same condition at the expiration of the lease." * * * "And it is further agreed that the party of the first part shall at all times (if there is not sufficient

oil in the tank) have the liberty of pumping water into said tank to such an amount as to keep it safe in times of high water, which shall be done without charge to the parties of the second part."

The breach of the contract alleged was that the defendants did not put the tank in good repair.

There was very little evidence returned with the paper-book. It appeared by the statements of the respective parties in their paper-books, that the plaintiffs were owners of an extensive oil refining establishment on the Ohio river, and in 1865 had erected at their works a large tank of the capacity of 13,000 gallons made with iron sides and wooden bottom for storing crude petroleum. Before it was used a rise in the river forced the bottom up, and the tank became unfit for use. The tank being in this condition it was leased to the defendants by the above articles. It is the custom to put water into tanks with wooden bottoms, because the water remaining at the bottom prevents leakage of the oil. Shortly after the lease the defendants employed a tank builder who repaired the bottom of the tank at cost of about $1,000. The tank continuing to leak, another tank builder put in an entirely new wooden bottom, which made the tank as secure as it could be made by a wooden bottom; but both the tank builders were of opinion that owing to the position of the tank and the nature of the ground, no wooden bottom could be put in that would not leak. The tank continued to leak, the leakage varying from 10 to 180 barrels per day. The plaintiff's evidence was that it always leaked more than a tank "in good repair" should leak. The defendants' evidence, by experts, was that the repairs were as thorough as time and skill could ma e them. The defendants in their paper-book stated that by their uncontradicted ev dence no oil had been lost from the tank whilst in the possession of themselves or their successors. On the trial the defendants offered to show that after they took possession and were about to make the repairs, Mr. O'Hara, the president of the company, said that their cost would not exceed from $200 to $500, as tending to show that the plaintiff did not intend by the agreement to exact the addition of an iron bottom costing several thousand dollars; also, to prove that Mr. O'Hara was present several times

whilst the repairs were in progress, saw the work going on, and expressed his entire satisfaction with the repairs as they were being made; also, the amount expended by defendants in repairing the tank, for the purpose of showing performance in good faith of the provisions of the contract. These offers were all objected to by the plaintiffs, admitted by the court, and several bills of exception sealed.

The following are points submitted by plaintiff, and their answers:

"4. The opinion of either party at the time the contract was made, or afterward, as to what repairs were necessary in order to put the tank in perfectly good repair, or what such repairs would probably cost, is irrelevant, and should not be considered by the jury."

Answer: "The estimate put upon the necessary repairs by the president of the company, can only be considered by the jury as tending to show his understanding of the contract, as to whether iron or wood was to be used in making the repairs."

"6. In regard to the alleged breach of defendants' contract, the only inquiry of the jury should be, did the defendants put the tank in perfectly good repair, and leave it in such condition at the end of their lease? Any work they may have done, or expense they may have incurred, in their efforts to repair the tank, have no bearing on this question, if the jury find that in point of fact the tank was not in perfectly good repair at the end of the lease."

Answer: "We can not instruct the jury as requested in this point, without some qualification. It is true that if nothing but an iron bottom would put this tank in the condition required by the terms of the contract, then all the labor performed, and expenses incurred by them, would be of no avail, and could not be considered by the jury in estimating the damages. But if a wooden bottom could be made so as to meet the requirements of the contract, and if this bottom was not sufficient, then the question would arise, would, or would not, all the material put in by the defendants have to be taken out, and new material procured and put in, or could this bottom be made complete, so as to answer the demands of the lease, by adding thereto other materials, and carrying out and completing the work done by them? If this could be

done, then the plaintiffs would be entitled only to such damages as would so complete the work."

The court (HAMPTON, P. J.), recapitulated the evidence and charged: * * *

"The plaintiff's counsel contends that unless a wooden bottom can be made as tight as an iron bottom, the defendants were bound to put in one of the latter material.

"The counsel for the defendants insists that they were only bound to make as good a job as could be made, using wood instead of iron as the material, and that they had done so.

"There is one question of fact and of law in this case. The law of this contract is, that the defendants were bound to put the tank in perfectly good repair, and to leave it in the same condition at the expiration of the lease—and the question of fact is, have they done so? The parties themselves made the law, by the very terms of the contract. The words 'perfectly good repair,' do not mean that any particular material must be used. Iron, brass, copper, zinc, lead, wood or stone may be used, if either will make such a job as was contemplated by the parties when they entered into this agreement. Now, what do they mean by the terms employed? This tank had a wooden bottom at the time—many others had the same kind—but some had iron bottoms. The latter material has become, according to the testimony of an experienced tank-builder, much more common now than when this lease was made. We have no evidence, except the terms of the contract, that either party contemplated a change of the material from wood to iron—nor does it seem to me very likely, if it had been thought necessary by the plaintiff to make such a change, that this contract would have been silent on the subject. The words here are to receive a reasonable construction—and what is that? Why, that the character of the materials and workmanship must be of such a quality—so adapted to the purpose for which these repairs were designed, as, in the estimation of men experienced in this business, would be presumed perfectly good. Every branch of business must be judged of by the rules of the trade, and the common sense of mankind. If a landlord should lease to a tenant a house with a shingle roof, which leaked badly, and bind the tenant to put the house in perfectly good repair, would it be the understand-

ing of the parties that he was to repair the roof with the same kind of materials, although it might not be as tight, or as warm, as permanent, or as secure against fire, as a slate roof?

"If, therefore, this bottom was made of such material and workmanship as to constitute it a perfectly good job, in the sense in which that phrase is legitimately used by men skilled in that branch of business, and if the same was so left, then the plaintiff can not recover, and your verdict should be for the defendants. But if you should find otherwise, then your verdict should be for the plaintiff, for such sum as would put the repairs in that condition. You will take all the evidence into your careful consideration, and will render such a verdict as will be just under the law as laid down by the court."

The verdict was for the defendants. The plaintiff took a writ of error and assigned for error the admission of the evidence objected to and the instructions of the court.

H. BURGWIN, for plaintiffs in error.

G. SHIRAS, JR., for defendants in error.

The opinion of the court was delivered, November 22, 1869, by READ, J.

The plaintiffs were the owners of a large refining works on the Ohio river, and had erected on their premises an oil tank for storing crude petroleum in the spring of 1865. It had iron sides and a wooden bottom, and held about 13,000 barrels of oil. Before it had been used by the plaintiffs, by a rise in the river, and the water getting under it, the bottom was injured and it could not be used without repairs. The ground on which it stood had been selected by the plaintiffs, and it turned out from its position and the nature of the ground it would leak more than such a tank when in good repair would leak. If the plaintiffs had undertaken to repair it they would naturally have done so by repairing the injury to the wooden bottom by strengthening it and putting it in the same condition as nearly as possible as it was when completed before the rise in the river. This they would have considered as putting the tank in perfectly good repair.

Instead of doing this themselves, on the 22d of January, 1866, they leased it to the defendants for two years, and in lieu of rent the defendants agreed "to put the tank in perfectly good repair and to leave it in the same condition at the expiration of the lease." All that this would naturally mean, would be at the outside to put a new wooden bottom in, and then it would be as good as it ever was when originally finished for use by the plaintiffs. Repair means to restore to its former condition, not to change either the form or the material. If you are to repair a wooden building you are not to make it brick, stone or iron, but you are to repair wood with wood.

In a suit, therefore, upon this agreement, there would be two questions to be tried: 1st, was there a breach? and 2d, what are the damages sustained by the plaintiffs? The evidence on both sides of course would relate to these two points.

The plaintiffs' theory was that perfectly good repair meant that if this could not be effected except by putting in an iron bottom, the defendants were bound to put in an iron bottom and thus make it a complete iron tank, when the original tank which was the subject of repair was intended by the plaintiffs to have only a wooden bottom, and was so built by them and ready for use, but never tested by the plaintiffs, but believed by them to be entirely fitted for the purpose of storing crude petroleum. The lease was in fact of an iron tank with a wooden bottom.

The leak complained of was of water, not oil, for in such tanks water is pumped in to prevent the leakage of the oil. The ground for alleging a breach of the agreement was the water leakage, and the material point of time in this respect was at the expiration of the lease, when it was to pass into the possession of the plaintiffs.

The defendants immediately proceeded, at an expense of about $1,000, to repair the bottom then in the tank. This proving insufficient, they employed another experienced tank-builder, who, at an additional expense of about $2,000, put in at their request an *entirely new bottom* on top of the first one, and made it as tight and secure as it could be made with a wooden bottom.

The evidence of the declarations of Mr. O'Hara and of his

presence whilst the repairs were going on, as disproving the iron bottom theory and upon the question of damages, was properly admitted, and so also the evidence of the repairs actually made and their expense, was entirely pertinent, not only on the question of any breach of the agreement, but of the damages alleged by the plaintiffs.

Upon examining the charge and the answers to the points assigned for error we do not find any error. The court explained the law and properly left the finding of the facts to the jury.

The counsel for the plaintiffs in error has not given the evidence bearing upon his exceptions and points to enable us to judge of their applicability. To answer some of the points as requested by the plaintiffs would have been positive error, and in others the court were called upon to decide matters of fact, which is the province of the jury.

The error of the plaintiff's contention was that he asked for more than the agreement called for.

Judgment affirmed.

SHARSWOOD, J., dissented as to the admission of O'Hara's declarations, and the answer of the court to the 4th point.

THOMPSON v. NOBLE ET AL.

(3 Pittsburgh, 201. Common Pleas of Erie County, Pa., 1870.)

Suit concerning wife's separate estate. In proceedings for an account of the proceeds of the wife's separate estate the husband can not sue alone without joining his wife in the bill.

Venue. A bill for an account of the produce of an oil well must be filed in the county where the well is situate.

[1] **Oil is a mineral** and is included in the act of 1850, relating to tenants in common of minerals, under the general term of "other minerals." The fact that oil was not then known as a product of land does not alter the matter.

The opinion of the court was delivered January 20, 1870, by VINCENT, A. J.

[1] *Hartwell* v. *Camman*, 3 M. R. 229; see note 8, 10 M. R. 421.

The plaintiff's bill sets forth that he is the husband of Rebecca Thompson, and that in her right he comes into court with this complaint. He then further sets forth that the said Rebecca was and is tenant in common with the defendants and others, in a tract of land in Venango county, in this State, on which was an oil well, known as the Noble well; that as such tenant in common with the defendants and others to complainant unknown, she was entitled to a large quantity of oil obtained from said well, and by said defendants appropriated to their own use, and praying the said defendants to furnish the complainants an account of the oil procured from said well from 1863 to the date of the filing of this bill, and that they be ordered to pay to the said Rebecca Thompson the amount of money which is or should be owing to her, for or on account of the portion of said oil belonging to her, etc. It will thus be seen that Rebecca Thompson is throughout the entire petition treated as the owner of the claim in controversy, and of the property out of which it issued, and that she is such owner "by various contracts, conveyances and agreements, good in law."

The 6th section of the act of April 11, 1848, enacts that any species of property, whether real, personal or mixed, which may be owned by, or belong to, any married woman, and whether acquired before or after coverture, shall be used and enjoyed by her as her own separate property.

The bill in this case does not state how or when the interest in the land mentioned was acquired by Mrs. Thompson, but it does state that it was acquired by conveyances, etc., good in law; and as this declaration is made by her husband, we must conclude she has a right to use and enjoy it as her own separate property. In *Williams* v. *Coward*, 1 Grant, 21, and in *Nutz* v. *Reutter*, 1 Watts, 229, it is decided that the wife can not be joined with the husband in a suit founded on a contract made during coverture, but in neither of these cases did it appear that the property for which suit was brought was the separate estate of the wife. Nor does it appear, in the case before us, that the estate of Mrs. Thompson in this land was acquired during coverture. These cases, then, are inapplicable. Brightly, in his Equity Jurisprudence, Sec. 9, lays it down that in all suits in equity concerning the

property of a married woman she should sue in her own name by her next friend; and in *Goodyear* v. *Rumbaugh*, 1 Harris, 480, it is decided that in no case can the husband alone bring suit for an injury done to the separate property of his wife; and to the same effect is *Sheidle* v. *Weishlee*, 4 Harris, 134; *Cummings' Appeal*, 1 Jones, 272; and in many other cases.

The complainant in this case, in our opinion, has no power to institute these proceedings in his name, nor without joining his wife in the bill.

And we are much in doubt whether it is an amendable defect; for, to bring her into this proceeding now would require the entire structure of the bill to be changed. But, if there was nothing else in the way, we think we would allow an amended bill to be filed in terms. The land out of which the oil in controversy was produced is in Venango county, in this State, and this suit is brought in Erie county; and the defendants allege, in their demurrer, that since the act of April 25, 1850, such a bill or petition as this one can only be exhibited in the county in which the land is situated.

The 24th section of that act (see Purdon's Digest, Tit. Equity, fol. 53) provides that in all cases in which any coal or ore mines or minerals have been, or shall be, held by two or more persons as tenants in common, and coal, iron ore, or other minerals have been or shall be taken from the same, it shall be lawful for any one or more of said tenants in common to apply, by bill or petition in equity, to the court of common pleas of the county in which the lands lie, praying an account, etc.; and it further provides that all the tenants in common shall be made parties to said bill, and also how service of process, or motion, shall be made on such as reside out of the county.

If then, the oil taken from said Noble well is a mineral production, it must arise and be comprehended within the "other minerals," in the act of 1850, and as that act in terms refers to the future as well as the present, the fact that oil was unknown as a product from land when that act was passed, does not in any degree affect its application to oil lands. Without going into a geological or chemical discussion as to the origin and properties of oil, we decide that it is enough mineral in

its character to bring it within the scope of the provisions of the act of 1850. It is called "a mineral" and "a species of mineral," in *Kier* v. *Peterson*, 5 Wright, 357. And although the particular character of the product in this report was not under consideration, we must regard it as almost, if not quite, a judicial definition of its character. Even if we were in doubt as to its being a mineral, we think we would be justified in deciding that a free construction of the 24th section of the act of 1850 would embrace it, for that act was manifestly intended to cover all products of land taken from under the surface, and not part of its regular annual produce.

We are, then, of the opinion, that as Mrs. Thompson is a tenant in common of the land, out of which the oil she claims was produced, she must be made a party to the suit, and that the bill must be presented to the Court of Common Pleas of Venango county, in which the lands lie, and that this demurrer of the defendants must be sustained and the bill dismissed at the costs of the plaintiffs, and a decree is ordered to be entered accordingly.

Demurrer sustained and bill dismissed at costs of complainant.

MASON v. NORRIS.

(18 Grant's Chancery, 500. Ontario Court of Chancery, 1871.)

Tenants in common of oil in tank. Plaintiff and L. were tenants in common of an oil well; they filled a tank with oil equal in quantity to 2,400 barrels, of which 1,600 belonged to plaintiff, and 800 to L., and they agreed that the oil was not to be sold under $5 a barrel; they were not partners. L., without authority, contracted for the sale of all the oil in the tank at $1.25 per barrel: *Held*, on a bill against the purchaser, that L. had no right to sell the plaintiff's portion of the oil; that the defendant's removal of it would be wrongful; but that as the oil was a staple commodity which had not any peculiar value, and as there was no fiduciary relation between the plaintiff and L., the plaintiff was not entitled to an injunction, and that his only remedy was an action at law.

This was a motion for an injunction to restrain the defend

ant from selling or removing certain quantities of coal oil claimed by the plaintiff under the circumstances appearing in the judgment of court.

Mr. BETHUNE, for the application.

Mr. MCLENNAN, *contra.*

STRONG, V. C.

The plaintiff alleges, and I think he also sufficiently, for the purposes of this motion, proves, that he and a person named Luce, being tenants in common of an oil well, agreed to construct, and did construct, a tank of sufficient capacity to contain 2,400 barrels of oil, and that they filled this tank with oil, 1,600 barrels of this oil being the plaintiff's and the remaining 800 barrels belonging to Luce, upon the agreement that the oil was not to be sold until $5 per barrel could be procured for it. That Luce, in fraud of the plaintiff, sold to the defendants the plaintiff's oil together with his own, at the price of $1.25 per barrel, and the defendants are now about to remove the oil from the tank. Upon this state of facts the plaintiff asks for an interlocutory injunction to restrain the defendants from removing the oil.

I am of opinion that the agreement between the plaintiff and Luce did not constitute a partnership either *inter se* or as regards third persons. The evidence does not seem sufficient to make out that there was an ostensible partnership, and there was not, in my judgment, such a community of profit and loss as to create a partnership in the absence of express agreement. Luce, therefore, had no authority to bind the plaintiff; and the sale did not confer any legal title upon the defendants, who, if they remove a greater quantity of the oil than the 800 barrels belonging to Luce, will do so wrongfully. But I am unable to discover any ground on which to found the jurisdiction of this court. The oil can not be said to be of any peculiar value, being a staple commodity which can always be purchased, and therefore property in respect of any damage to which compensation can be had at law; and I can discover no fiduciary relationship existing between the plaintiff

and Luce, which would warrant an interference on any such ground as the court interfered in the case of *Pogley* v. *Buds*, 14 Beav. 34. Luce was not even intrusted with the possession of oil as the plaintiff's agent; for according to the statement of McIntyre, who made an affidavit read by the plaintiff on this motion, he, McIntyre, was left by the plaintiff in charge of the oil. If, therefore, the motion was to succeed, I could suggest no case of threatened injury to chattels which the court could not be called upon to restrain, and it is clear upon authority that in all but the two classes of cases I have indicated the court ought not to interfere. I am aware of the dictum of Lord Westbury in the case of *Holroyd* v. *Marshall*, 10 H. L. C. 191, but I do not consider that would warrant me in granting an injunction. Moreover, I think the objection that Luce ought to have been a party is well founded. I refuse the motion.

ALLISON AND EVANS' APPEAL.

PORTERFIELD AND TREAT'S APPEAL.

(77 Pennsylvania State, 221. Supreme Court, 1874.)

"Protection" to oil lease. Oil land described by metes and bounds with a "protection" of eight rods on the north side and ten rods on the east side, was leased to Evans. *Held*, that the "protection" extended to the point where the lines on the respective sides of the land would intersect.

Injunction against operation on the protection. Oil land on the northeast corner of Evans' lease was let to Treat, who sank a well within the "protection," injuring Evans' well on his land. *Held*, that Treat could be restrained from operating on the "protection," and that in the same proceeding damages could be assessed against him for the injury.

[1] **Equity jurisdiction, once acquired, extends to trespasses.** As a general principle, when a court of equity has obtained jurisdiction for one purpose it may retain it generally for relief; as well in cases of continuing trespass and waste as in cases of fraud, accident, mistake and account.

Prevention of multiplied suits. To prevent multiplicity of suits, a court of equity will decree an account of the damages or waste at the same time with an injunction, and make a decree to settle the entire controversy.

[1] *Thomas* v. *Oakley*, 7 M. R. 254.

Appeals from the Court of Common Pleas of Clarion County.

The bill in this case was filed July 1, 1872, by J. W. Allison and A. Evans against R. W. Porterfield and M. C. Treat,

It set out that Joseph Foust, on the 15th of July, 1871. leased for twenty years to Philip Foust and William Spencer, by metes and bounds, which were stated in the bill, a lot of ground containing three acres, one hundred and twenty-three perches of land, "for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil," and also a "protection of ten rods on the east side" of the lot, "and eight rods on the north side;" the lessees to deliver to the lessor one eighth of the petroleum, etc., raised on the premises; the lessor to use the premises for tillage, except such part as may be necessary for mining purposes and a right of way to the places of mining, etc.; that on the 29th of March, 1872, the lessees transferred their interest in the lease unto A. Evans, one of the plaintiffs, and on the 19th of July, 1872, Evans transferred seven eighths to J. W. Allison, the other plaintiff; that the defendants had entered on "the protection," and, after notice from the plaintiffs to desist, had erected machinery on "the protection," and "were boring and drilling thereon for carbon and petroleum, in violation of said notice and the rights of the plaintiffs."

The prayers were:

1. For an injunction.

2. For an account of all waste, etc., "and in the event of their obtaining oil prior to the judicial determination of this case, to account for all oil so obtained from the premises."

The defendants answered that they entered on the land mentioned in the bill under a lease from Joseph Foust, the plaintiffs' lessor, and denied that they were in "the protection" set out in the bill; they averred that the land leased by them from Joseph Foust lies northeast of the northeast corner of the plaintiffs' leasehold; that their lease from Joseph Foust was bounded by lines which were merely an extension of plaintiffs' north and east lines, beyond their northeast corner; they further averred that they believed that the land leased to them was not covered by "the protection" men-

tioned in the bill, and that they were advised as matter of law that "the protection" did not extend to any land included in their lease.

The question as to the land within "the protection" was, whether the north and east lines of "the protection" were to be extended until they met, or whether "the protection" on the north side extended no farther than to the east line of the leased land, and on the east side no farther than to the north line of the leased land; in the latter case the defendants might sink wells, etc., immediately outside of plaintiffs' leasehold.

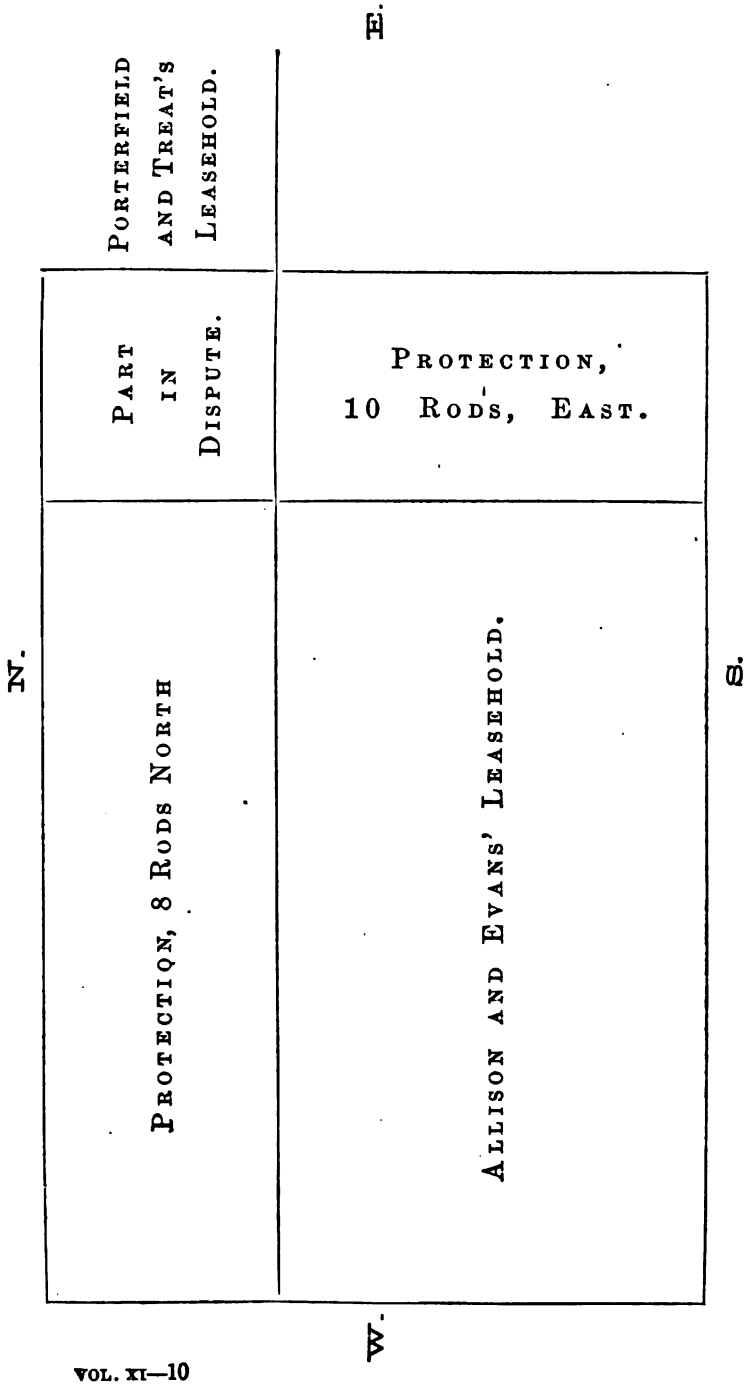
The annexed diagram may more clearly indicate the respective claims of the parties.

James Boggs, Esq., was appointed examiner and master. He took testimony in the case, and, as master, reported amongst other things that the plaintiffs commenced sinking an oil well on the premises leased to them, and completed it on the 14th of January, 1872. The well produced from ninety to one hundred barrels of oil daily; that on the 28th of March, 1872, Joseph Foust leased to the defendants a lot lying northeast from plaintiffs' lot, containing about two acres, and shortly afterward commenced sinking a well on the disputed part.

The plaintiffs commenced a second well on their lot which was completed July 15, 1872, and produced about fifty barrels of oil daily. The defendants' well was completed about the middle of August, 1872, and then produced about sixty-five barrels of oil daily. The product of oil from the plaintiffs' wells decreased, and at the hearing before the master the aggregate product of both their wells was about sixteen barrels daily. He also reported the amount of oil which the defendants had obtained from their wells, its value, etc.; that the sinking of the well was an injury to the plaintiffs, and that the amount of damages was one half of the whole production of the well.

He further reported his opinion in the case as follows:

* * * "This protection was to prevent Joseph Foust, or any other person under him, from putting down an oil well at any place within the prescribed limits. At no place could Joseph Foust, or any other person under him, put down a well on the north side of this Evans and Allison lease within


E.
PORTERFIELD AND TREAT'S LEASEHOLD.
PART IN DISPUTE.
PROTECTION, 10 RODS, EAST.
N.
PROTECTION, 8 RODS NORTH
ALLISON AND EVANS' LEASEHOLD.
S.
W.

eight rods of the actual line thereof, nor on the east side within ten rods; nor could Evans and Allison bore at any place within their protection outside of the actual lines of their lease, but could bore up as near their lines as they could erect their buildings for the purpose. The chief object of this protection appeared to be to secure to the lessees the exclusive chance for oil under their lease, or at least in so far as eight rods additional north, and ten rods on the east would do that. As to whether the protection extended around the corner, the language of the agreement is somewhat ambiguous and doubtful, which ambiguity and doubt are to be taken most strongly against the lessor, Joseph Foust, and his subsequent lessees with notice. * * * It is our opinion that the intention of the parties at the making of the lease was to secure to it the same protection at the corner as at the sides, and that the protection lines at the northeast corner extended until they intersect each other. * * * If we are correct in our interpretation, the well of Porterfield and Treat is within the plaintiffs' protection." * * *

The master found also that the entire production from defendants' well to July 19, 1873, was $18,777.79, and therefore $9,388.89 would be the measure of damages to the plaintiffs.

He therefore recommended a decree in favor of plaintiffs for $9,388.89, and for an injunction to restrain defendants from further damage to the plaintiffs' leasehold.

The defendants filed exceptions to the report: that the master erred in not holding that the bill laid no ground for equitable relief; that a bill for an account would not lie, the remedy being at law; and in finding that the defendants' well was within "the protection" mentioned in the plaintiffs' bill. There were exceptions also as to the amount of damages and the mode of computation.

The court (JENKS, P. J.) overruled the exceptions as to the right of the plaintiffs to an injunction to restrain the defendants from further operations on the premises in dispute, and decreed an injunction accordingly; and sustained the exceptions as to the question of damages as not being cognizable in equity, and as to that dismissed the bill without prejudice.

Both parties appealed to the Supreme Court and assigned for error the portions of the decree against them respectively.

KNOX & MAFFETT and J. CAMPBELL, for Allison and Evans.

D. LAWSON and W. S. CORBETT, for Porterfield and Treat.

Mr. Justice WILLIAMS delivered the opinion of the court, October 11, 1875.

This was a bill to restrain the defendants from boring for oil, and to account for the damage done to plaintiffs' leasehold, and for all oil obtained on the premises. The master found that the well bored by the defendants was within the "protection" stipulated for in the plaintiffs' lease, and that the damages occasioned thereby to the plaintiff's leasehold amounted to one half the entire production of the well from August 20, 1872, to July 19, 1873, the market price or value of which was $9,388.89, and accordingly he recommended that a decree be entered in favor of the plaintiffs for the amount so found, and that an injunction be granted against the defendants to prevent further damage to the leasehold of the plaintiffs.

The court below, on exceptions filed by the defendants to the master's report, ordered a perpetual injunction to restrain the defendants from further operations upon the premises in dispute, and dismissed the bill as to plaintiffs' claim for damages without prejudice. Both parties have appealed from the decree; the defendants from the order awarding the injunction, and the plaintiffs from the order dismissing the bill.

The question presented by the defendants' appeal will be first considered. Are the plaintiffs then entitled to the injunction?

If the stipulation in the lease, on which the right to the injunction depends, is to be strictly construed according to the literal meaning of the language, the defendants' well can not be regarded as within the protection for which it provides, and if so, the plaintiffs have no legal or equitable right to the relief asked for in the bill. But the agreement must be construed with reference to the subject-matter, and so as to effectuate, if possible, the purpose for which it was intended. The lease was "for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil" in the tract described

therein. The parties probably knew that if oil was found in the demised premises, a well bored within a short distance would draw off more or less of the oil, and that for the same reason a well on the border or side of the tract would draw part of its supply from the adjoining ground. The object of the agreement was therefore two-fold: to prevent the lessor or any one under him from mining or boring wells within eight rods of the north and ten rods of the east line of the tract described in the lease, and to give the lessors more ground for the supply of any wells they might drill or bore on the demised premises in proximity to these lines.

Is it then a reasonable supposition, that the parties intended to leave a gap at the corner where these lines intersect which would render the "protection" valueless and defeat the purpose for which it is intended? If the north and east lines were to be protected, then every point in these lines must be protected; and if so, why should the parties leave at the corner where they meet, an open area ten rods long and eight rods wide, in which a well could be bored, as it was by the defendants, to the great damage and waste of the leasehold? The master and the court below were of the opinion that it was the intention of the parties to secure the same protection to the corner as to the sides of the demised tract, and that the agreement should be so construed as to carry out their intention. This, as it seems to us, is its reasonable interpretation; and if so, the defendants had no right to construct buildings and machinery, and to put down a well within a few feet of the corner of the plaintiffs' leasehold, and pump therefrom, as they did, large quantities of oil. Nor can there be a doubt that the plaintiffs have a sufficient title to enable them to obtain redress by injunction of the wrong done by the defendants. The trespass of which they complain is of a permanent nature, and, under the facts found by the master, destructive of their leasehold. It is clear then, that under the equitable powers conferred by the statute, the court below had jurisdiction for its prevention or restraint: *Stewart's App.*, 6 P. F. Smith 413; *Smith's App.*, 19 Id. 474; *Masson's Appeal*, 20 Id. 26. The defendants' appeal must therefore be dismissed.

We come now to the question presented by the plaintiffs'

appeal. Are they entitled to a decree for the damages found by the master? The court below refused to make such decree, on the ground that the plaintiffs' remedy was in a court of common law jurisdiction and not in a court of equity. But it is well settled, as a general principle, that where a court of equity has obtained jurisdiction for one purpose it may retain it generally for relief.

This seems to be the rule, not only when the jurisdiction attaches for discovery in cases of fraud, accident, mistake and account, but where it attaches for injunction in cases of continuing trespass and waste. In such cases the course is to sustain a bill for the purpose of injunction, connecting it with the account, and not compel the plaintiff to go into a court of law for damages: *Thomas* v. *Oakley*, 18 Vesey, 184. To prevent multiplicity of suits, the court will decree an account of the damages or waste done at the same time with an injunction, and proceed to make a complete decree, so as to settle the entire controversy between the parties. This is the doctrine not only of courts of equity having general chancery jurisdiction, but of this court, under the equitable powers conferred by the legislature. The principle was asserted and applied in *McGowin* v. *Remington*, 2 Jones, 56, and it has been recognized and re-affirmed in subsequent cases: *Souder's App.*, 7 P. F. Smith, 498; *Coleman's App.*, 25 Id. 441; *Masson's App.*, 20 Id. 26. Why then should we hold that the power of the court for relief ceased with the injunction? If the statutes giving chancery powers in injunctions and matters of account do not, as contended, expressly give the power to decree damages against tort feasors, they give in express terms, "power and jurisdiction of courts of chancery so far as relates to the prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the rights of individuals." If, incident to the right of injunction in such cases, courts of chancery decree an account of the damages or waste done, is it an unreasonable construction of the statute to hold that the legislature, in giving the power and jurisdiction which it confers, intended that it should be exercised as fully and with the same incidents as it is by courts of chancery in like cases? There is no more difficulty in taking an account of the damages in cases of waste and continuing trespass, than there is in

settling a partnership or other account or claim of which equity has jurisdiction. The court below was therefore in error in deciding that it had no jurisdiction in equity of the plainti s' damages, and dismissing their bill so far as it asks for an account, and in this respect the decree must be reversed.

And now, October 11, 1875, it is ordered, adjudged and decreed that the defendants' appeal be dismissed, and that so much of the decree in this case as orders a perpetual injunction to issue to restrain the defendants from further operations, etc., and that they pay the costs of this case, be affirmed; and that the residue of said decree, dismissing the bill as to the plaintiffs' right to recover damages for the money complained of, be reversed and set aside. And it is further ordered, adjudged and decreed that the defendants pay to the plaintiffs the sum of $9,388.89, being the amount of the damages to the plaintiffs' leasehold by the defendants' well, as found by the master, with interest thereon from the 24th of November, 1873, the date of filing his report; and it is further ordered that the defendants pay the costs of their own and of the plaintiffs' appeal, to be taxed by the prothonotary, and the record be remitted to the court below for the purpose of enforcing and executing this decree.

1. Prohibition in insurance policy that "refined coal or earth oils" should not be kept or used upon the premises, construed not to prohibit the use of kerosene for lighting: *Bennett* v. *North B. & M. Ins. Co.*, 10 Rep. 409; INSURANCE Notes, 8 M. R. 63.

2. Relative rights of husband and wife in oil lands owned by wife: *Cady* v. *Gale*, 5 W. Va. 505, 547: *Gale* v. *Oil Run Co.*, 9 M. R. 1.

3. A lease for the purpose of mining for oil vests a corporeal interest: *Barker* v. *Dale*, 8 M. R. 597.

4. Contract to pay for sinking oil well out of the first oil obtained, and dispute between parties as to terms of further working: *Coville* v. *Gilman*, 13 W. Va. 314.

5. Receiver to take charge of oil property pending ejectment, refused: *Enterprise Transit Co.'s Appeal*, 11 Rep. 109; *Post* RECEIVER.

6. Lease of oil lands; facts held not to work a forfeiture: *Gale* v. *The Oil Run Co.*, 9 M. R. 1.

7. Certain deeds construed to grant exclusive right to oil on land demised for ninety-nine years: *Bronson* v. *Lane*, 91 Pa. St. 153; *Post* TENANT IN COMMON.

8. A corporation engaged in removing petroleum from place to place by means of pipes, is a transportation company: *Columbia Conduit Co.* v. *Com.*, 90 Pa. St. 307; *Post* TAX.

9. It is a question for a jury whether a contract for the delivery of a certain number of barrels of oil is fulfilled by the delivery of a less number of barrels containing the requisite quantity of oil: *Cullum* v. *Wagstaff*, 2 M. R. 573.

10. A contract to convey land if vendee should find oil upon it, construed to mean if found in a reasonable time: *Dark* v. *Johnston*, 9 M. R. 283.

11. Right of corporations to lay pipe for the transportation of oil: *United N. J. R. R.* v. *Standard Oil Co.*, 7 M. R. 625; *Central R. R.* v. *Standard Oil Co.*, 7 M. R. 604; *West Va. Co.* v. *Ohio River Co.*, 22 W. Va., 600; 46 Am. Rep. 527.

12. Conflagration of oil while in the act of delivery: *Rochester Co.* v. *Hughey*, 4 M. R. 282.

13. As to whether oil is a mineral, see note 8, 10 M. R. 421.

WEISMAN v. SMITH ET AL.

(6 Jones' Eq. 124. Supreme Court of North Carolina, 1860.)

[1] **Pre-emption agreement between partners, when waived.** Where there is a privilege of pre-emption in a contract between mining partners, a subsequent sale, by consent, of a part interest of one partner, or a descent cast, will prevent the further operation of the covenant.

Application of the rule to the facts. By agreement, Smith was to furnish funds to purchase certain plumbago lands and convey an interest to Weisman under a contract of partnership, one of the terms of which was that neither should convey without allowing his partner the refusal, or first privilege of purchase. After some years Weisman, with Smith's consent, sold half his interest in the mines to a third party. After one or more transfers, this third party's interest was represented by a company formed to work the mines. Weisman then filed a bill averring a tender under the refusal clause, and seeking a conveyance of the entire premises from the then various owners. *Held*, that it might be doubted whether the court would in any case decree a specific performance upon a contract tending to monopoly; but that the sale of an interest by consent to third parties without provision for the partner's right of pre-emption, justified the inference that such right of pre-emption was not further to be insisted upon.

Cross-bill—Distinct equity. Where the defendant has a distinct equity, he must set it up by a cross-bill or by an original bill; he can not have the benefit of it by an answer.

[2] **Statute of Limitations in favor of deceased partner.** After the death of one of the members of a copartnership, the Statute of Limitations begins to run in favor of his personal representatives against a claim to have an account of profits received by him.

Cause removed from the Court of Equity of Wake County.

The plaintiff, Weisman, and Richard Smith, deceased, on 21st of January, 1843, entered into an agreement in writing, to purchase and work in copartnership, black lead or plumbago mines in the county of Wake. Smith, by said agreement, was to advance the requisite funds to purchase the lands containing the mineral, to an amount not exceeding $10,000, and as soon as the lands were purchased, Smith was to convey one half thereof to Weisman in fee and Weisman was to pay Smith $3,500 at the expiration of five years, without interest, for his moiety, for which the plaintiff pledged his interest;

[1] *Wild* v. *Milne*, 11 M. R. 207.

[2] *Union Co.* v. *Taylor*, 5 M. R. 323 ; *Watts' App.*, 8 M. R. 223.

and should the purchase of the necessary lands exceed $10,000, the excess should be a charge upon the profits of the concern. As soon as the purchases were made the parties were to commence the business of raising, preparing for market, and selling the mineral under the name and style of "Smith and Weisman," and the plaintiff was to lend his constant attention to the business personally. The covenant concludes thus: "And it is further covenanted as follows, to wit: that if either party shall, at any time, wish to withdraw from the said concern, he shall not be at liberty to sell or convey his share or moiety, or any part or portion thereof, to any other person, before he shall have given to his co-partner at least twelve months' notice thereof, and to whom the refusal to purchase shall always be given within that time; and the parties do severally bind themselves, their heirs, executors, administrators or assigns, to the strict performance of this last article."

Smith, in pursuance of this contract, bought a large quantity of land, lying mostly in separate and disconnected parcels for which he took deeds in fee simple to himself, for which he paid an excess over $10,000 of about $6,000, and the bill charges that he cut firewood and received rents from the said land, up to the time of his death in 1852, and afterward his devisees, the defendants, Penelope and Mary Ann, did the same, until they sold the whole of their interest in the premises in April, 1854.

The plaintiff also charges that the said Smith obtained large quantities of mineral, plumbago or black lead, which he sold in the northern markets, and for which he received the money, at high prices, but did not account with the plaintiff for any part of it.

In October, 1849, Weisman, with the consent of Smith, agreed to sell to one James Hepburn one half of his interest in the said mines, to wit, one fourth part thereof, at the sum of $10,000; and on receiving the sum of $3,500 in cash, and $6,500 in a note payable to Weisman, and indorsed by him to Smith, he, Smith, made to Weisman and Hepburn a deed for one half of all the several tracts of land that had been purchased by him for the purpose of mining as stated, except two small tracts hereafter referred to, and took from them a mortgage of their interest to secure the said sum of

$6,500. This latter sum Smith claimed for advancements made by him over and above the sum of $10,000, which he was bound by the contract to invest. This sum of $6,500 has since been paid by Hepburn to the assignees of Smith.

In the month of April, 1854, James Hepburn sold his interest in these mining lands to William H. Winder, of the city of Philadelphia, and subsequently, to wit, on 20th of April, 1854, Mrs. Penelope Smith and Miss Mary Ann Smith, the devisees of the said Richard Smith, sold their interest, to wit, one half of the said land, to the said William H. Winder, and he took a deed in fee for the same. Winder and others obtained a charter from the governor of the State in 1854–5 for an incorporated company, called the Herron Mining Company, and the lands and mines were worked afterward by that company. The bill alleges that previously to the sale to Winder the plaintiff proposed to Mrs. Smith and her daughter to take their share of the lands and mines according to the provision of the covenant, and offered them a full price for them, but they refused to let them have them; that he has made offers to Winder and to the Herron Mining Company to pay them what they gave for the premises and take the whole property, but they have refused to comply with this request.

The bill was filed on the 24th of September, 1857, and insists that the plaintiff is entitled, according to the terms of the contract of 1843, to have his election to take the whole of the lands, etc., purchased from the Smiths by Winder, and sold to the corporation at the price the latter gave for them; and he now elects, and prays the court to decree him a conveyance of the premises by the said Herron Mining Company; also an account from the executors of R. Smith of his share of the rents and profits derived from the property by him in his lifetime, and an account of the same from Mrs. Smith and her daughter, while they had and used them; also, from Winder and the Herron Mining Company, since they have come into possession.

The answers of the several defendants were filed, but it is not necessary to notice more of their contents than that they insist on the Statute of Limitations in bar of the accounts asked for, all the time pleading three years before the filing of the plaintiff's bill. Also, Mrs. Smith and her daughter say that

at the time of the sale to Hepburn, it was expressly agreed that the mill and mill site should remain the property of Smith exclusively, and should be excepted from the conveyance by him to Weisman and Hepburn, and that by the agreement of all parties, an instrument of writing was drawn up to that effect which the plaintiff promised to sign, but that he suddenly left the city of Raleigh and returned to Philadelphia, and that another portion of the four acres was to be exempted for a church.

GRAHAM and G. W. HAYWOOD, for the plaintiff.

MASON and B. F. MOORE, for defendant Winder.

MILLER, for the Smiths.

PEARSON, C. J.

1. The plaintiff is not entitled to a specific performance of that part of the agreement executed by him and Richard Smith on the 21st of January, 1843, in which it is stipulated that if either party should wish to sell, he shall give the other "the refusal," or what was aptly called on the argument "the right of pre-emption."

We are inclined to the opinion, that a court of equity would not have interfered to compel a specific performance between the *original parties*. Such stipulations are against public policy, and operate in restraint of alienation; for which reason they are not favorites, either in courts of law or courts of equity. At law, an understanding of this nature is not treated as a grant of an easement or privilege, or as a condition, so as to be attached to the land, in respect to which it is made, but merely as a collateral personal covenant, for a breach of which the party may be entitled to an action for damages: *Blount* v. *Harvey*, 6 Jones' Rep. 186; *Keppel* v. *Bailey*, 2 Mylne & Keene, 577, where it is said, "incidents of a novel kind can not be attached to property at the fancy or caprice of any owner," because "it is clearly inconvenient to the science of the law that such a latitude should be given." "Great detriment would arise and much confusion of rights, if parties

were allowed to invent new modes of holding and enjoying real property, and to impress on their lands a peculiar character, which would follow them into all hands, however remote."

Considerations of this kind apply as forcibly in equity as at law; consequently, the court should not treat such agreements as creating a trust binding the parties and privies to a specific performance, but should leave the party aggrieved by breach thereof, to his remedy at law. If one takes land in fee simple, and covenants not to alien, a court of equity will not interfere by injunction to prevent him him from so doing, but will leave the party to his remedy at law. That is clear. The covenant under consideration is, in effect, a modified agreement not to alien, and falls under the like reason.

We are also inclined to the opinion that the effect of the sale by Weisman to Hepburn, with the concurrence of Smith, of one half of his interest in the lands, and of the deed executed by Smith to Weisman and Hepburn, vesting in them, as tenants in common, the legal right to one undivided moiety of the lands, made such a change in the relation of the parties as to annul and supersede the stipulation which had been made between Weisman and Smith, in respect to the right of pre-emption. It was based on the footing of the co-partnership, and was an emanation of the idea entertained by the parties of a "grand monopoly" in respect to the mines, which suggested that if one of the parties should ever wish "to withdraw from the said concern," it was highly probable that the other party would desire to become the owner of *the whole*, and the stipulation was made to enable him to possess himself of the monopoly. The firm, which was known under the name and style of "Smith and Weisman," was dissolved by the transactions above referred to, and it is fair to infer that the idea of the monopoly was abandoned and passed away when the firm ceased to exist; for no allusion is made to this stipulation in Smith's deed, and Hepburn is not required to become a party to it, although he acquired one fourth of the land as a tenant in common. All mutuality was in this way destroyed, and the fulfillment of the stipulation was, in fact, rendered impracticable. Was Weisman, owning one fourth, entitled to a pre-emption right in respect to the whole of Smith's half—

or only to one half of that half? Did Weisman communicate to Hepburn an interest in the pre-emption, so as to give him the right as to one fourth, both in respect to Smith and Weisman? Was Smith bound to offer the refusal to Weisman alone? Or to Weisman and Hepburn jointly? Or to them severally, each one fourth? And, *per cont a*, had Smith a pre-emption right as against Weisman alone, or Weisman and Hepburn jointly? Or the two severally? The parties have not enabled the court to answer these questions. The absence of any provision for this new state of things raises a presumption that the stipulation in question was treated and considered by all parties as being defunct.

We are of opinion that upon the death of Mr. Smith the stipulation did not follow the land and bind his devisees in respect to it, so as to entitle the plaintiff to enforce it against them or their assignees. It could only have this effect by giving to it the character *of a trust.* We can conceive of no ground to clothe it with this character. On the contrary, the considerations above suggested tend to show that the court would not allow it to be so treated, except as between the original parties, even if an intention to make it a trust, had been expressed by the terms of the agreement.

The clause whereby the parties "bind themselves, their heirs, executors, administrators and assigns, to the strict observance of this article," has no further effect than the same words added to a bond for the payment of money. It may be that the plaintiff can maintain an action at law against the personal representatives of Smith or his real representatives, that is, his devisees, for breach of this covenant, but there is no ground on which he can treat a purchaser as holding in trust for him; because no trust was created in his favor by the original agreement.

2. The plaintiff is entitled to a declaration in the decree, that he owns one fourth of the legal and equitable estate in all the lands set out in the deed executed by Smith to Weisman and Hepburn, 1st of February, 1850, free from an incumbrance or lien, by reason of the mortgage executed by himself and Hepburn to Smith, and to a further declaration that the mortgage debt has been satisfied, and to a decree for a reconveyance. This equity was yielded by the defendants on the

argument, except as to four acres of land which, it is alleged, are given to the church, and four acres on which the mill is situated; in respect to which they allege a cross equity to have a specific performance of an agreement to convey the same to Smith, executed by Weisman and Hepburn. Whether the defendants will be able to establish the cross equity, or whether it can be met by the plaintiff on the ground that it was obtained without consideration, and by the undue exercise of the influence which Smith held over them by reason of being a creditor, and having them in his power, or will, at all events, be allowed only to the extent of giving a lien on the mill as a security for the amount expended by Smith in the erection of the mill, are questions into which we will not enter, because they are not presented in a proper manner by the pleadings. Where the defendant has an equity, he must set it up by a cross-bill. This is a well settled rule of the court. The decree, however, in this case will be so framed as to be without prejudice to this equity of the defendants, so as to enable them, if so advised, to seek to have it set up by an original bill, when the matter can be fully presented without being attended by the complication and confusion that a cross-bill filed in this case would necessarily have produced, considering the very voluminous pleadings and exhibits relevant to the several equities which the plaintiff seeks to enforce.

3. The plaintiff's right to an account against the personal representatives of Smith, is barred by the Statute of Limitations. It is true that as between copartners and tenants in common, the Statute of Limitations does not run, until, as Henderson, C. J., expresses it in *Wagstaff* v. *Smith*, 2 Dev. Eq. 264, "there is a *cesser* of the privity or connection from which the accountability arises." In that case, and in *Northcott* v. *Caspe*r, 6 Ired. Eq. 303, the relation of the parties was not changed; but in our case, on the death of Smith, there was a change in the relation of the parties. Smith, of course, could no longer be a copartner, or a tenant in common, and, consequently, an action accrued for or against his personal representatives to have an account of the profits received, which action is barred by the statute; for, although his wife and daughter acquired his estate, as devisees, the estate passed

to them as assignees, and the relation which had previously existed between him and the plaintiff was of course at an end.

So the right of action in respect to the profits accrued at that time; for there was a "*cesser* of his privity or connection as tenant in common," a new relation then commenced between him and the devisees, and the case is the same as if one tenant in common sells. That is, a *cesser* of his relation as tenant in common; and a cause of action then accrues to all of the tenants in respect to the arrearages of profits, and a new relation begins between the other tenants and the purchaser.

The bill was filed on 24th September, 1857. Mrs. Smith and Miss Mary sold to Winder 20th of April, 1854, at which time there was a *cesser* of the connection with the plaintiff as tenant in common. So, the plaintiff's right to an account against them is barred, except from the 24th of September, 1854. For all profits or moneys received for, or on account of, or out of the lands, after that date, he is entitled to an account as against Mrs. Smith and Miss Mary, and the defendant Winder, and the Herron Mining Company. How far the fact that the developments of lead ore cropped out in so many places and the quantity of wood was so great as to leave ample room for all the tenants in common to come and take their share, distinguishes that species of profits from the receipt of rent, either in money or product paid by the lessees of the several houses and cleared pieces of ground in the many tracts of land, is a question which may be presented by exception to the account.

Decree accordingly.

PER CURIAM.

1. A title bond giving the privilege of purchase, without obligation to purchase, or other consideration, is a mere option and *nudum pactum: Gordon* v. *Darnell*, 2 M. R. 220; *Smith* v. *Reynolds*, 2 M. R. 227; *Finerty* v. *Fritz*, 1 M. R. 438.

2. Contract to work mines with option to purchase: *Gordon* v. *Swan*, 3 M. R. 84.

3. Time within which option must be exercised: *Carondelet Works* v. *Moore*, 2 M. R. 625.

BLEWETT v. COLEMAN ET AL.

(40 Pennsylvania State, 45. Supreme Court, 1861.)

Waiver of right to part. By contract the right to partition may be waived: affirming *Coleman* v. *Coleman*, 11 M. R. 183, and *Coleman* v. *Grubb*, 23 Pa. St. 393, previous controversies between the same parties.

A traditional survey agreed at one time to have been made and supposed to have been at that time made, but never satisfactorily proved, and a subject of continued contention, can not be treated by courts as binding upon the parties, although they have attempted to fix it by subsequent survey.

Discovery of copper after contract concerning partition of iron ores. Where tenants in common by agreement continued their tenancy in common, and arranged for the enjoyment of their respective rights in a certain manner of all the iron ore in certain deposits, their rights in copper or other more valuable ore subsequently discovered in the same tract would remain unchanged; or at least they would still be tenants in common therein.

[1] **Rights of lessee of one co-tenant.** A party who has mined ore as tenant of one of several co-owners, may recover in trespass against another of the co-owners for taking away the ore so mined by such tenant; otherwise, if he fail to prove the alleged lease or license under which he mined the ore.

The receipt of rent is evidence of ratification.

Balancing of interests. Where the interest of a witness is equally balanced between the parties, he is competent and may testify.

Error to the Common Pleas of Lebanon County.

This was an action of trespass *vi et armis*, brought March 16, 1860, by *Benjamin Blewett* v. *Robert W. Coleman and Artemus Wilhelm*, to recover damages for taking and carrying away a quantity of copper ore which had been mined by him in the Cornwall mine hills of Lebanon county, and for injuries done to the shanties and shafts which he had erected and sunk on the premises, under a lease from persons claiming to own certain rights or workings in said ore hills.

The defendants, by their attorney, entered the plea of not guilty, to which Coleman added the plea of *liberum tenementum*, which was followed by a replication and a new assignment. Afterward an assignment and special plea of license, and a

[1] *McCord* v. *Oakland Q. Co.*, 64 Cal. 134; 49 Am. R. 686.

special agreement were filed, and on the issues thus made up the parties went to trial.

The material facts of the case, as contained in *Coleman* v. *Coleman*, 7 Harris, 100, and *Coleman* v. *Grubb*, 11 Id. 393, and the paper-books of the parties, are substantially as follows:

By a written agreement made May 6, 1786, between Curtis Grubb, Robert Coleman, J. Yeates, Edward Burd, James Clemson, Joseph Shippen, Jr., and Edward Hand, owners of the Cornwall and other estates in Lebanon county, it was agreed that partition be made and "that the ore banks belonging to Cornwall Furnace be divided into three parts," which were to be allotted, having regard to quantity and quality. The parties finding that this agreement could not be carried into execution without injustice to some of them, in a subsequent agreement of August 30, 1787, agreed that the ore banks should "remain together and undivided as a tenancy in common, the parties interested to have certain portions, and that for this purpose an accurate survey shall be made of the said ore banks and hills," if not already done, etc., and also that neither of the parties should interfere with either of the others at any mine hole opened and occupied for the purpose of raising iron ore.

A supplemental agreement was made by the parties on the same day, providing that "as it may so happen that veins of ore may extend beyond the limits of the *survey made lately by Thomas Clark*, it is hereby expressly declared and agreed that Burd Grubb, Henry Bates Grubb and Robert Coleman, and their respective heirs and assigns, shall have full liberty and privilege of ingress, egress and regress to and from the said mine hills, and shall have free and uninterrupted liberty and power to dig, sink shafts, drive drifts, raise and carry away any ore that may be found to extend beyond the limits of the said survey, without doing any material damage to the iron works or plantations," and also that the privileges of the water should be secured to the use of Curtis Grubb and Robert Coleman, their heirs and assigns forever.

Under these agreements an amicable partition was made of all the estates except the mine hills, which were the undivided

estate and supposed to be included within the lines of the Clark survey.

Some time in 1860, Blewett, claiming to be a tenant of E. B. Grubb and C. B. Grubb, under lease from Eckman, their superintendent, dated November 14, 1857, mined *copper ore* from the *base* of one of the three "*mine* hills," but outside of the lines of the Clark survey, as re-located by surveyor Weidle, which was seized and appropriated by R. W. Coleman, who, with others of the same name and the Grubbs, were descendants of the parties to the original agreements, and the owners of the title to the "hills;" for which seizure and for the destruction of the works, filling up of the shafts, etc., Blewett brought this action. The validity of the plaintiff's lease from the agent of the Grubbs was denied by the defense, but it was proved that he had entered upon the premises in pursuance of the lease, had expended money in making preparations to raise the ore, had paid the rent agreed upon in the lease, and that the Messrs. Grubb were repeatedly upon the hills while he was mining.

It was admitted on the trial that R. W. and William Coleman were owners of fifty ninety-sixth parts, G. D. and Robert Coleman owners of thirty ninety-sixths, and Clement B. Grubb and Edward B. Grubb owners of sixteen ninety-sixth parts of the Cornwall ore banks and mine hills.

In the course of the trial the defendant offered in evidence the deposition of Edward B. Grubb, and called Clement B. Grubb as a witness, both of whom were objected to on the ground of interest, but the court below overruled the objection, which were the subjects of the first and second assignments of error.

Verdict and judgment for the defendants.

WM. DARLINGTON and JOSIAH FUNCK, for plaintiffs in error.

JAMES L. REYNOLDS and A. R. BOUGHTER, for defendant in error.

The opinion of the court was delivered July 24, 1861, by WOODWARD, J.

Blewett, the plaintiff, mined a quantity of copper ore

in the Cornwall mine hills of Lebanon county, which the defendant, Coleman, seized and appropriated, and this action was brought for the alleged trespass. Blewett claimed to have a lease from the agent of E. B. Grubb and C. B. Grubb, who were tenants in common with Coleman. Whether Eckman, the resident agent of the Grubbs, had authority to lease to Blewett, was a contested fact in the case which was properly submitted to the jury. But if he had authority, it became a material question whether the place from which the ore was taken was upon that part of the estate which the Grubbs and Colemans held as tenants in common. If it was, the action was well brought. If it was not, the authority of Eckman to make the lease, even if it existed, would not protect Blewett, because the Grubbs, if not tenants in common, were without title. The *locus in quo*, if not a part of the common estate, belonged to Coleman in severalty. This became the main question in the cause. There was no doubt that the copper ore was mined below the line of what was called the Clark survey of the mine hills, a survey which depended for its location on the tes imony of Jacob Weidle, who had made a resurvey of the hills according to what he calls "the survey purporting to have been made by Thomas Clark." The court held, that under the agreement entered into by the ancestors of the Colemans and Grubbs, on the 30th of August, 1787, the estate left undivided was included within the lines of the Clark survey, and consequently that all without those lines passed under the amicable partition they then made. This cut up the plaintiff's action by the roots. Was the court right in thus extending the partition of 1787 to all those parts of the mine hills which were not embraced within the survey?

The titles to the mine hills and their geological peculiarities were fully discussed in this court on two former occasions: *Coleman* v. *Coleman*, 7 Harris, 100, and *Coleman* v. *Grubb*, 11 Id. 393. In the last of these cases the very question was raised which re-appears here, and we supposed we had decided that what was exempted from partition was not a part of the mine hills, but the whole of them, the whole of those three upheaved masses of rock and ore, the outlines of which are familiar to every neighbor. The Clark survey has embarrassed the parties interested in these hills long enough. At

no time has it been produced in evidence. Mr. Weidle had only a traditional knowledge of it; and even if he re-located it correctly, there is no satisfactory evidence that it was adopted by the parties to the agreement of 1787. Those papers provided, "that the ore banks shall remain together and undivided, and as a tenancy in common;" and that "an accurate survey shall be made of the said ore banks and hills, if not already done;" and in the supplemental agreement it is provided that "it may happen that veins of ore may extend beyond the limits of the survey made lately by Thomas Clark," in which event each party was to have full liberty to dig and carry away "any ore that may be found to extend beyond the limits of said survey."

The parties were engaged in dividing a large estate, including iron furnaces, woodland, and farm land, which they held in connection with the mine hills as tenants in common, and Thomas Clark seems to have been their surveyor. Before they got through they encountered such difficulties in making partition of the mine hills, that they determined to retain them in common. It is possible that Clark had made some sort of a survey of the hills, but an *accurate* survey was to be made, if not already made, and meanwhile the parties were to be permitted to take ore beyond the lines of the survey Clark had already made. They did not treat whatever survey Clark had made as the accurate survey for which they stipulated, and clearly it was not; for according to all the testimony, including that of Weidle, it did not embrace the whole of the hills. No survey which did not include the entire circumference of the hills could be deemed accurate within the meaning of the papers of 1787, because the difficulties which led to those papers arose out of the variety and complex relation of the ores—circumstances which rendered partition impossible. Ores so valuable, so various, and so intermixed, could not be parted among the owners into severalty "without the greatest injustice to some of the parties." This was their reason for retaining them in common; but this reason would apply as forcibly to the ores near the base of the hills as to those near the top. Nay, more forcibly, because the largest quantity of ore would naturally be found at the base. Did the parties mean to divide some of the ores in the hills

into severalty, and hold the rest in common? That would have been a very ineffectual solution of the "difficulties" confessed on the face of their papers. Instead of a solution of difficulties, it would have been an invitation to endless litigation. They spoke of the premises that were to be held in common as "ore banks and hills," as "ore banks belonging to Cornwall Furnace," and as "mine hills," but always meant, whatever the form of expression, the whole of those three conical hills so well known for their remarkable deposits of ores.

It is not always easy to fix the beginning of a hill. If a stream of water flow at its base, it may mark the point at which the hill shall be said to begin. There is a rivulet between the middle hill from which the ore in question is alleged to have been taken, and grassy hill, but between the rivulet and the middle hill is a plateau several rods in width, so that the base of the middle hill can not be said to be marked by the rivulet. But inasmuch as Blewett dug the ore above the level of that plateau, it is safe to conclude, for all the purposes of the present suit, that he dug it from the middle hill—one of those parts of the estate which the papers of 1787 declared should "remain together and undivided as a tenancy in common." The allusion to the Clark survey in the supplemental agreement was not for the purpose of restricting the rights of the parties, but rather for the purpose of extending them, or, at least, of rescuing them from any abridgment by reason of the lines Clark had run around the hills.

It is somewhat difficult to make an accurate survey of the hills on account of the metallic attraction of the place; no accurate survey seems to have been made; none was adopted by the ancestors of the parties in 1787. We are left, therefore, to the location of the hills according to their topography; and while this may, under some circumstances, become a difficult question, it is not difficult in this instance. Blewett mined on the middle hill, and whether above or below the lines of Clark, is of no more consequence than it was in the case reported in 11 Harris. That was a case in which "nigger heads" lying on the surface had been appropriated, not a vein mined from within the Clark lines and pursued below them. We disregarded the Clark survey there as we do here, and

probably it will be well for the parties when no more is heard about it, because whilst the jury in that case did not find it the jury in this case did, and the next jury may or may not find it according to the accidents of the trial. The title of the parties ought to be kept on a more stable foundation.

It will result from thus putting the Clark survey out of the case that the question which the court discussed about the right of the Grubbs or their lessee to take *copper* ore can not arise in the case. For, what if the adjectives and nouns in the papers do all refer to iron ore—it was not those papers that constituted the title of the parties to the contents of the hills. They owned the hills and all they contained before the papers were made, and what the papers did was to compel the signers and their successors to enjoy the hills as tenants in common and not as tenants in severalty. If the hills contained copper or more precious ores, the whole hills being an estate in common, the ores, whatever their name, were a common estate also. If the agreements were limited to iron ores, the property in all other ores was unchanged. It is not worth a moment's consideration, therefore, whether the expression "any ore" in the supplemental agreements could fairly be construed to include copper ore.

When the case shall be tried on the grounds that have been indicated, the question whether the plaintiff had or had not the right to mine outside the Weidle lines, and whether he was not a tenant at will, will most likely disappear. We can not foresee how they will arise. The Weidle survey is nothing but a re-location of the Clark survey, and when one is set aside the other must go with it. The ore in question was mined under a written lease, executed by Eckman on behalf of the Grubbs. The term had not expired, and therefore it seems to us no question about a tenancy from year to year, or at will, can arise. Whether Eckman had authority to execute the lease, or whether, if his authority was defective, the Grubbs had ratified his act, were questions of law and fact on which Blewett's rights depended essentially. The receipt of rent on the foot of the lease would be evidence of ratification. These it seems to us, will be the questions in the case. Coleman, as tenant in common with the Grubbs, had no right to seize the ore mined by Blewett under a lease or license from the

Grubbs. If Blewett had neither lease nor license from the Grubbs, he is not entitled to damages as against Coleman.

We think the interest of the Grubbs was so balanced that there was no error in admitting them to testify.

The judgment is reversed, and a *venire facias de novo* is awarded.

1. Right of action for wrongfully raising ores from lands situate in another State, may be assigned and prosecuted by the assignee in New York: *Hoy* v. *Smith*, 49 Barb. 360.

2. Royalty reserved on ore by tenant for life will go to remainder-man: *Basset* v. *Basset*, Amb. (Appendix) 843; *Post* TENANT FOR LIFE.

3. Ore is *quasi* rent of mines: *Campbell* v. *Leach*, Amb. 740.

4. One tenant in common can not grant the right to dig ores to the prejudice of his co-tenant: *Boston Franklinite Co.* v. *Condit*, 19 N. J. Eq. 394; *Post* TENANT IN COMMON.

5. Degree of skill and diligence required in fulfillment of contract to cleanse ore: *Campbell* v. *Gates*, 2 M. R. 502.

6. Contract for the sale of iron ore at the "Ogden mine" corrected so as to cover ore intended to be sold but which did not come from the Ogden mine proper: *Firmstone* v. *DeCamp*, 10 M. R. 439.

7. Ores dug from mineral lands of the United States are personal property, and as such subject to State taxation: *Forbes* v. *Gracey*, 94 U. S. 762; *Post* TAX.

8. Construction of contract f r the sale of ores to be regulated by assay: *Kennedy* v. *Schwartz*, 2 M. R. 679.

9. Construction of ore contract as to time of delivery with reference to presumed knowledge of the capacity of the furnace to which it was to be delivered; measure of damages: *Rhodes* v. *Cleveland Rolling Mill*, 17 Fed. 426.

10. An agreement to deliver ore, made and signed in the name of the superintendent: *Held*, t he agreement of the corporation: *Post* v. *Pearson*, 108 U. S. 418.

11. Assay; when evidence allowed of erroneous assays: *Phipps* v. *Hully*, 18 Nev. 133.

12. Question discussed as to the name to be given to an ore which contains a mechanical combination of several ores, to some of which plaintiff is entitled and some of which belong to defendant: *Boston Franklinite Co.* v. *New Jersey Zinc Co.*, 13. N. J. Eq. 216.

13. Usage may be shown as to how ore is to be delivered: *Steel Works* v. *Dewey*, 37 Ohio St. 242.

GASTON v. PLUM ET AL.

(14 Connecticut, 344. Supreme Court of Errors, 1841.)

Interest necessary in plaintiff. In order to sustain a bill in chancery, it is necessary that the plaintiff should have an interest in the subject of that suit, or a right to the thing sought.

[1] **Bill by owner of right to mine, brought after assignment.** The grant of a right to mine is not of such a fiduciary capacity, or so personal in its character, or so uncertain in its nature as to be incapable of assignment; therefore, where the grantee of such a right has assigned the same before bringing his bill he has no interest in the suit and his bill must be dismissed.

Bill in chancery for the specific performance of an agreement.

The subject of the agreement was a tract of land in Cheshire, called "The Dick Farm," owned by Rufus Plum, one of the defendants, containing about forty acres, having a vein of barytes running through it, which, at the date of the agreement, had not been opened or its value ascertained.

Plum, being desirous of having the experiment made, whether, by mining, valuable minerals might be found on the land, to induce the plaintiff to undertake the labor and expense of so doing, on the 21st of January, 1839, signed and delivered to the plaintiff the following written instrument: "This certifies that I hereby give, grant and bargain with N. H. Gaston, of New Haven, to give him full power and liberty to dig or mine on my land in Cheshire, called 'The Dick Farm;' also to transport and carry away any stone or mineral which he may dig, or cause to be dug on my land, within one year from the first day of May next, provided he shall fill up the hole or level the ground again at the expiration of the time, or pay a fair value for the damage of the land; also that I will give him the preference, at the expiration of the time, in making a new contract for digging the same. (Signed) Rufus Plum." At the time of the execution and delivery of this instrument no consideration in money was paid by Gaston to Plum; nor did Gaston bind himself, or enter into any agreement with

[1] *Boyle* v. *Laird*, 7 M. R. 301.

Plum, to enter on the land or dig thereon, or carry away any stone or mineral therefrom, unless the instrument imports on its face an obligation so to do; yet the right or privilege which Gaston acquired by virtue of the instrument, especially that clause which gave him the preference in making a new contract, was of great value to him. On the 11th of May, 1839, Gaston, by a writing made and signed by him on the back of said instrument, assigned to a company of persons associated by the name of "The Mineral and Manufacturing Company," all his interests under the instrument, which assignment was in the following words: "In consideration of one dollar and other valuable considerations, received to my full satisfaction of the Mineral and Manufacturing Company, I hereby grant, assign and set over unto the said Mineral and Manufacturing Company, the within written instrument, and all my interest, right and privilege in the land therein mentioned, with the appurtenances, and all benefit and advantage which may be derived from the within instrument; to have and to hold the same unto the said Mineral and Manufacturing Company, their successors and assigns, subject to the conditions and provisions of the within instrument. Dated at New Haven, the 11th day of May, 1839. (Signed) Nelson H. Gaston."

Under this assignment said company have ever since held all Gaston's interest acquired by the first mentioned instrument. (The remaining facts in the case it is not necessary, for the present, to state.)

The case was reserved for the advice of this court as to what decree ought to be passed.

BALDWIN & BRISTOL, for the plaintiff.

R. I. INGERSOLL and KIMBERLY, for the defendants.

STORRS, J.

In chancery, it is necessary that the plaintiff, in order to sustain a suit, should have an interest in the subject of the suit, or a right to the thing demanded: Coop. Eq. Pl. 166; 7 Conn. Rep. 342.

In the present case it is found by the court that, before the

bringing of the bill, the plaintiff had granted and assigned to the Mineral and Manufacturing Company all his interest, right and privilege in the land which is the subject of the contract, of which he seeks a specific performance, and all benefit and advantage which might be derived from that contract; and from the assignment, which is recited, it appears that it does not even contain any covenant of warranty, or any other description, on the part of the plaintiff. There is, therefore, such an entire destitution of interest on his part, in the subject of this suit, that to a bill founded on the contract set up in this case, brought by the assignee, who would be the proper plaintiff, it would not be necessary to make the present plaintiff a party; and, indeed, we see no objection to his being a witness in the cause.

The plaintiff endeavors to obviate this difficulty, on the ground, 1, that the contract is fiduciary and personal in its character; and 2, that the interest of the plaintiff in it is contingent and a mere possibility; and, therefore, that it is incapable of assignment.

We do not think, however, that the contract is of a fiduciary character, or in the nature of a personal confidence; there is nothing in it which makes it necessary that it should be performed personally by the plaintiff, or requires his peculiar skill, science or judgment; nor, in our opinion, is it of that uncertain and contingent description that it can not, on that account, be transferred; if it were, it is not such an interest as courts of equity would regard. They will protect it, if at all, in behalf of the real owner.

The plaintiff has referred us to ——— v. *Wallford*, 4 Russell, 372. In that case Wallford, for a valuable consideration, agreed to surrender a copyhold to Curtis, who, on borrowing money from Wright, agreed with him that he, Curtis, would surrender the same copyhold to Wright, by way of mortgage security, of which last agreement Wright gave notice to Wallford. The court held that, in a bill brought by Curtis to compel Wallford to surrender to him, Wright need not be made a party. We do not see the bearing of that upon the present case. There was no assignment or transfer by Curtis of any interest to Wright, but only an executory agreement between them, and in order to enable Curtis to fulfill it on his part, it

was necessary that Wallford should first fulfill his prior agreement with Curtis. And the court entertained a bill on behalf of Curtis to compel Wallford to do so. Although it would tend to promote the execution of the agreement between Curtis and Wright, the latter had no interest in the agreement between Curtis and Wallford as required him to be made a party in a suit brought by Curtis to enforce it.

The plaintiff having no interest in the subject of the bill, it ought for that reason to be dismissed.

We refrain from expressing an opinion on the merits of the case. It would be improper to do so in the absence of the assignee, who is the real party interested, and who has, therefore, a right to be heard.

In this opinion the other judges concurred.

Bill dismissed.

NOTE.—See *Edwards* v. *Stonington Cemetery Association*, 20 Conn. 473; *Chipman* v. *City of Hartford*, 21 Conn. 494.

GOLLER ET AL. v. FETT ET AL.

(30 California, 481. Supreme Court, 1866.)

[1] **Tenants in common may join in an action.** Tenants in common in a mine, each owning undivided interests acquired at different times, may sue jointly to recover possession of all of their several undivided interests.

[2] **Verbal sale of mining claim.** A verbal sale of a mining claim, even if accompanied with a delivery of possession, does not pass the legal title.

[3] **Damages for trespass on gold claim.** The damages for wrongfully removing the gold-bearing earth from a claim, and extracting the gold therefrom, are the value of the gold less the expense of digging the gold-bearing earth and separating it from the realty, so as to make it personal property.

Appeal from the District Court, Fourteenth Judicial District, Placer County.

The plaintiffs averred in their complaint that they were, on

[1] *Brown* v. *Warren*, 16 Nev. 229; *Weese* v. *Barker*, 7 Colo. 178; *Bullion Co.* v. *Croesus Co.*, 5 M. R. 255.

[2] Cited, *King* v. *Randlett*, 5 M. R. 605; *Felger* v. *Coward*, Id. 273.

[3] *Hendricks* v. *Spring Valley Co.*, 58 Cal. 191; 41 Am. R. 257.

the 8th day of January, 1866, the owners of and in possession of seven twelfths, undivided, of a tract of mining claims at Forrest Hill, Placer county, known as the "Uncle Sam Claims," and that defendants then ousted them therefrom.

The answer set up that the claim which the plaintiffs made to said seven twelfths was not of a joint but several interest therein, and that for said reason the plaintiffs were improperly joined as such in the action.

On the trial, Goller and Hoffman testified that they made verbal purchases from Benfeldt of interests in the Uncle Sam Claims—Goller of four twelfths, in April, 1865, and Hoffman of three twelfths, in August, 1865. Fett, one of the defendants, purchased the Uncle Sam Claims from Benfeldt, and received a deed duly acknowledged from Benfeldt, dated January 3, 1866. The other defendants were Fett's hired hands. When Fett purchased he went into possession of the entire claim. Goller and Hoffman had been working in the claims with Benfeldt up to the time of Fett's purchase.

After the testimony of plaintiff had closed, defendants moved for a nonsuit, because, among other reasons, if plaintiffs had any interests in the mine they were several, and acquired at different times, and they could not maintain an action jointly to recover them.

The court denied the motion.

The mine was worked through a tunnel several hundred feet in length, extending into the side of a mountain, and the gold-bearing earth was obtained by drifting the gravel to the height of five or six feet above the bed rock.

Plaintiffs, in making out their case, proved the amount of gold defendant had taken out of the claims, and claimed as damages seven twelfths of its value. Defendants offered to prove by a witness, in order to reduce damages, what was the expense of digging the gravel and transporting it to the mouth of the tunnel, where it was washed. The court, on objection of plaintiff, rejected the testimony.

The court instructed the jury that, if the jury believed from the testimony that Benfeldt owned the Uncle Sam mining ground, and while he owned and possessed the same he made a verbal sale of interests therein to plaintiffs, then, if plaintiffs entered into possession under the verbal sale, such

verbal sale was as valid and effective to convey title as a written bill of sale.

The defendants' attorney excepted to the charge.

Plaintiffs recovered judgment for the possession of the seven twelfths of the claim, and for the value of seven twelfths of the gold dust taken out, as damages. Defendants appealed.

The other facts are stated in the opinion of the court.

CHARLES A. TUTTLE, for appellants.

Jo. HAMILTON, for respondents.

By the Court, SHAFTER, J.

The plaintiffs sue to recover the possession of certain mining ground, of which they claim to be the owners to the extent of seven twelfths. The allegations of the complaint are denied in the answer, and the defendants plead specially, title in defendant Fett, and a misjoiner of parties plaintiff. The plaintiffs recovered a verdict at the trial, on which judgment was duly entered for seven twelfths of the premises undivided. The appeal is from the judgment, and from the order denying defendants' motion for a new trial.

Both parties claim under Benfeldt—the defendant Fett by a written conveyance, in due form, executed January 3, 1866, and including the whole of the property; the plaintiffs by verbal sales and transfers of possession previously made, the sale to Goller being of four twelfths, made in April, 1865; that to Hoffman being of three twelfths, made in August of the same year.

First. Assuming the sales and transfers by Benfeldt to the plaintiffs respectively, they became thereby tenants in common of the mine, and as such were authorized to sue jointly under the act of 1857: Stat. 1857, p. 62; *Touchard* v. *Keyes*, 21 Cal. 208.

Second. The legal title to the seven twelfths claimed by the plaintiffs did not pass to them by the verbal sales and transfers of 1865. The point arises under the act of 1860: Stat. 1860, p. 175. It was considered *arguendo* in *Patterson*

v. *Keystone Mining Co.*, 30 Cal. 360, that the provision that "conveyances of mining claims may be evidenced by bills of sale or instruments in writing not under seal," contained in the first section of the act, was mandatory, and that it was intended that that method of conveying mining claims should exclude conveyances by parol, even though accompanied by a delivery of possession. The point, however, was not directly adjudged in the case referred to, but it is now determined in conformity with the views therein expressed. The court below, in opposition to this view of the effect of the act of 1860, instructed the jury that if they found a verbal sale by Benfeldt to the plaintiffs respectively, accompanied by delivery of possession, that such verbal sales "would be as valid and effective to convey title as written bills of sale." This instruction was erroneous, and for anything we can know to the contrary, the jury may have based their verdict upon it, without reference to other instructions, presenting to the jury an alternative ground, on which, if found, the plaintiffs would be entitled to recover. We can not, therefore, intend that the jury ever put their minds upon the question as to whether Fett bought in 1866, with notice of the equitable right of the plaintiffs which their entry and possession had perfected.

Third. The court erred also in refusing to permit defendants to prove the expense of digging the gold bearing earth. The point was directly adjudged in *Maye* v. *Yappen*, 23 Cal. 306.

Judgment reversed, and new trial ordered.

SAWYER, J., concurring specially.

I concur in the judgment, on the last ground discussed in the opinion of Mr. Justice Shafter, but I am compelled to dissent from the views expressed under the second point discussed. The construction adopted would, upon the same principles, render a conveyance of a mining claim under seal void, as well as a verbal sale accompanied by a transfer of the possession to the vendee. I can gather from the language of the act no intention on the part of the legislature to abrogate any mode of conveyance before established. It seems to me that

the only object of this particular provision was to remove a doubt before entertained by many as to whether a written conveyance of a mining claim required a seal to render it valid. I can not think it was contemplated that a conveyance of a mining claim should be restricted to the form of conveyance permitted by the act.

Mr. Justice SANDERSON expressed no opinion.

THE PROPRIETORS OF THE MEXICAN MILL v. THE YELLOW JACKET SILVER MINING CO.

(4 Nevada, 40. Supreme Court, 1868.)

[1] **Suit in partnership name dismissed.** A motion to dismiss an appeal from an order refusing an injunction because the appellants, "the proprietors of the Mexican Mill," are neither natural nor artificial persons, sustained, because they have no authority to prosecute under a copartnership name, and the proceeding is an absolute nullity.

No plaintiff, a fatal defect—No amendment. An objection that no person, either natural or artificial, is named as plaintiff, is not waived by failure to demur under section 40 of the Practice Act of Nevada, which provides that defendant may demur because there is a defect of parties plaintiff or because the plaintiff has no legal capacity to sue; the defect is one which can not be cured by amendment; the objection may be taken at any time, and a motion to dismiss upon that ground will be sustained.

Appeal from the District Court of the Second Judicial District, Ormsby County.

R. M. CLARKE, for appellants.

HILLYER & WHITMAN, for respondent.

By the Court, JOHNSON, J.

An appeal is sought here from an order of a district court refusing an injunction, pending other proceedings, in what counsel for appellant is pleased to denominate a civil action.

These proceedings originated with a complaint in which

[1] Dicey on Parties, rule 20, p. 169.

plaintiffs are styled thus: "The plaintiffs, the proprietors of the Mexican Mill, a copartnership doing business in that name in the county of Ormsby, State of Nevada."

The transcript does not show that any objection was taken to this pleading in the lower court, and hence we infer that no such question arose there. But preliminary to considering the merits, respondent submits in effect a motion to dismiss the appeal, for the reason that it can not be entertained, as "'the proprietors of the Mexican Mill Co.,' being neither natural nor artificial persons authorized to maintain an action or proceeding, there is therefore no plaintiff, and consequently no action or proceeding to support an injunction."

Defendants may, by virtue of special provisions of our statutes, be sued by their copartnership name; and plaintiffs, in a limited class of cases, maintain actions under an associate name; Yet we know of no authority, statutory or otherwise, which permits an action involving the subject-matter of the present one to be prosecuted under a copartnership associate name.

This statement of the law is not controverted on the argument, and the error of the pleader is distinctly conceded by the learned counsel for appellants; but assuming this to be an objection merely on account of "a defect of parties plaintiff," he insists that "the objection should, in pursuance of section 40 of the Civil Practice Act, have been taken by demurrer, and thereupon the defect might have been cured by an amendment of the complaint; but as no such objection was made in the lower court, and defendant having submitted to a trial of the injunction matter, it is thereby concluded from raising the question in this court."

We think counsel misapprehend the true point of this objection. It is not such a difficulty as can be reached by anything contained in the code relating to demurrers. (Secs. 40, 45.) It is therein declared that the defendant may demur for certain enumerated defects apparent on the face of the complaint, among which are, that there is a defect of parties plaintiff or defendant, and that plaintiff has not the legal capacity to sue. When any of these defects do not appear upon the face of the complaint, the objection may be taken by answer; but if not taken by either demurrer or answer, the defendant shall be deemed to have waived the same. The

expression, "a defect of parties," refers to the absence of some person or persons who ought to be joined with the party on the record. Nor is the objection that "the plaintiffs have not the legal capacity to sue," but that no person, natural or artificial, is named as plaintiff. Certain persons, for instance infants, idiots, lunatics and married women, can not sue except by guardians, next friends, or in the case of married women by joining their husbands in certain cases. This appears to be what the provision means, and not the absence of a real person as plaintiff; and therefore it would seem that if the defendant wished to raise the objection in the lower court, it could do so only by motion to dismiss. But it is quite immaterial in this case as to the form of the objection, as the motion is resisted on no stronger ground than that if it had been made in the court below the adverse party might have corrected its pleading by amendment, and the authorities cited by appellant apply only to such a class of cases. But it will be conceded that if the defect or omission is beyond the reach of an amendment, the objection may be taken at any time. Section 68 of the code, in treating of amendments, provides that "the court may, in furtherance of justice, on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect." * * *

The very first step toward the commencement of a civil action or proceeding is the filing of a complaint, in which it is indispensable that there be shown a plaintiff and a defendant, and without which it is an absolute nullity, and renders void all subsequent proceedings had under it. In this instance no person, natural or artificial, is named as plaintiff; and if an amendment were allowed to supply the omission the effect of such amendment would necessarily be to make a plaintiff where there was none such at the inception of the action.

The section just quoted establishes an exceedingly liberal rule respecting amendments, yet there is nothing in its terms which would authorize an amendment of the character suggested by the record before us. As there is no plaintiff in this case, there was no action in the court below and nothing

to amend. So, too, there being no appellant in this court, there is really no appeal to be heard or determined.

In accordance, therefore, with the views expressed, we must allow the motion to dismiss the appeal. This conclusion forbids inquiry in respect to the other question discussed by counsel at the hearing.

GOODSPEED v. THE WASATCH SILVER LEAD WORKS.

(2 Utah, 263. Supreme Court, 1878.)

[1] **Non-joinder of parties as defense.** G., a manager and part owner of a mining claim, sold to defendant certain ores extracted from the mine. In an action brought by G. for the price of the ore defendant plead non-joinder of parties plaintiff, and alleging who were the true owners of the ore. On the trial defendant offered to show who were the real owners, whereupon the testimony was excluded. *Held*, that this ruling was error, and that defendant was entitled to sustain his plea of non-joinder by competent proof.

Idem—Part owner can not recover alone. In the face of a plea of non-joinder neither a part owner as such nor as manager can recover alone for the price of ores sold.

Book entries not proof of sale. To make a book of entries admissible for any purpose it should not only have been shown to have contained the original entry of the party but also to have been an account of his daily transactions, otherwise the entry will be simply a memorandum made by the party, to which he might refer to refresh his recollection, but ought not to be permitted as evidence to the court or jury in any sense.

A non-joinder of parties plaintiff is a good ground of non-suit.

Appeal from the Third Judicial District Court.

TILFORD & HAGAN, for appellant, the defendant below.

ROBERTSON & MCBRIDE, for respondent.

EMERSON, J., delivered the opinion of the court.

This is an action brought to recover the price of a lot of ore from the Reed & Benson mine, claimed to have been sold by plaintiff to defendant.

[1] *Hand* v. *Dexter*, 3 M. R. 608; *Robinson* v. *Smith*, Id. 443; *Westcott* v. *Minnesota Co.*, 6 M. R. 336.

The defendant answered, denying the sale to it of any ores, and further setting up in the answer that the ore, for the price of which plaintiff sought to recover in this action, was not the individual property of the plaintiff, and was the property of the owners of the Reed & Benson mine, giving their names. That these parties, as copartners, held and owned this cause of action; that they were still living; claiming a non-joinder or defect of parties plaintiff.

The case was referred by consent; a trial had before a referee, who found for the plaintiff. The report and findings were excepted to, the exceptions overruled and judgment entered. A motion for a new trial was made and overruled, and the defendant appeals.

The statement in the transcript contains all the evidence offered in the case, viz., that of two witnesses, the plaintiff in his own behalf, and one witness on the part of the defendant.

The first error occurring at the trial, of which the appellant complains, is that the referee refused to allow proof of the ownership of the ore at the time of the sale. In connection with this objection there are others which may be considered with it, although made as separate objections, viz., in refusing to allow the defendant to show who were the co-owners with plaintiff in the property sued for, mentioned in the complaint; also in sustaining the objection of plaintiff to the question of defendant as to whom the plaintiff was manager of the Reed & Benson mine for.

The plaintiff had testified that he was manager of the Reed & Benson mine at the time the ore was sold. On the cross-examination he was asked: "In what capacity were you acting about said mine?" And answered, "I was manager of the same and part owner." He was then asked: "Whom were you manager for?" This was objected to, and the objection sustained.

When the defendant's witness was upon the stand it offered to show that the parties mentioned in the answer were the owners of and tenants in common of the Reed & Benson mine and of the ore mentioned in the complaint. The plaintiff objected to this and was sustained in the objection.

It needs no argument beyond the mere statement of the

propositions themselves to demonstrate the error in sustaining the objections above referred to. There can be no question but what the defendant should have been allowed to show who were the real owners of the ore, and that the plaintiff had no right to recover for its value. This was the issue tendered by the defendant in its answer. By the rulings it was denied the right of sustaining it by evidence.

The testimony sought was all aimed at this one point—that of establishing who were the owners of the ore—and should have been admitted.

When the plaintiff closed his case the defendant moved for a nonsuit, for the reason "that the evidence shows that there is a non-joinder or defect of parties plaintiff in this, that the co-owners of plaintiff in the Reed & Benson mine have not been joined in this suit, and that plaintiff's relation to the property in dispute is that of a manager, and that plaintiff had no legal capacity to sue. The motion was denied, and this is also alleged as error.

The plaintiff had testified that "Reed & Benson mine was owing me. I supposed I owned all the ore. Was developing the mine for the owners, and selling ores for re-imbursement. Was acting as manager for Reed & Benson mine. This ore sued for was from Reed & Benson mine. Kept the account in the name of the Reed & Benson mine. My time checks were signed as manager of the Reed & Benson mine." On the cross-examination he stated that he was manager and part owner of the mine. This is all the testimony on the part of the plaintiff as to the ownership of the ore, and from which it plainly appears that he was part owner only; the extent of his interest or the extent of his right to recover, if at all, is nowhere made to appear.

All parties in interest should have been joined: C. L. 1237, 1239.

This defect did not appear upon the face of the complaint, and the defendant took advantage of it by his answer. The testimony of the plaintiff clearly shows that the other owners of the mine had an interest in the subject of the action and should have been joined with him. The motion for a nonsuit should have been granted.

It is also claimed that the referee erred in allowing in

evidence the book of entries made by plaintiff, as the same was incompetent, irrelevant and immaterial.

The only evidence in reference to and preceding the offer of the book in evidence was as follows: "Rendered the account to Lounsberry made out against the company at the time of delivery. Charged the same in my book of entries to the defendant." The plaintiff here offered in evidence his book of original entries, wherein the said ore appeared charged against said defendant.

To the same defendant objected, upon the ground that the same was irrelevant, immaterial and incompetent, and that the same could not be received in order to prove a sale from plaintiff to defendant.

The objection was overruled, and the entries made by plaintiff were read in evidence, to which ruling and decision the plaintiff then and there excepted.

The question here was as to the contract of sale, and the book was received in evidence to prove this contract; this was error. To make the book admissible for any purpose it should not only have been shown to have contained the original entry of the party, but also to have been an account of his daily transactions, otherwise the entry will be simply a memorandum made by the party, to which he might refer to refresh his recollection, but ought not to be permitted as evidence to the court or jury in any sense: *White* v. *Ambler*, 8 N. Y., 170; 1 Phillips on Ev. 311, and cases cited; *Juniata Bank* v. *Brown*, 5 S. & R. 226.

For the errors above mentioned, the order of the court below in refusing a new trial is reversed, the judgment vacated, the report and findings of the referee are set aside and a new trial ordered; the defendant to recover its costs in this court.

SCHAEFFER, C. J., and BOREMAN, J., concur.

1. Company interested as plaintiff made defendant: *Jones* v. *Bolles*, 5 M. R. 444.

2. In action based on fraud the partners of defendant need not be joined where plaintiffs dealt with defendant as a single party: *Leslie* v. *Wiley*, 47 N. Y. 648.

3. A part of the shareholders in a joint stock company may sue on behalf of themselves and the other shareholders, for the purpose of compelling directors to refund moneys improperly applied to their own use: *Hichens* v. *Congreve*, 4 Russ. Ch. 562.

4. Proper parties in actions of deceit against a corporation or its organizers: *Arthur* v. *Griswold*. 7 M. R. 46; *Getty* v. *Devlin*, 7 M. R. 29, 119; *Hopkins* v. *Roseclare Lead Co.*, 72 Ill. 373.

5. The corporation not a necessary party in controversies between its stockholders, concerning their mutual interests: *Faulds* v. *Yates*, 3 M. R. 551.

6. Failure to join necessary parties; insufficient excuse for such failure: *Westcott* v. *Minnesota Co.*, 6 M. R. 336.

7. The *cestui que trust* of a mortgagee is not a necessary party to the foreclosure: *New Jersey Co.* v. *Ames*, 12 N. J. Eq. 507.

8. New parties where plaintiff assigns after suit brought: *Laird* v. *Boyle*, 2 Wis. 431; *Post* PLEADING.

9. Where parties are made co-defendants in tort, their joint action must be proved: *Keyes* v. *Little York Co.*, 53 Cal. 724; *Post* TAILINGS. *Contra*, parties severally diverting water held jointly liable: *Hillman* v. *Newington*, 57 Cal. 56.

10 Necessary parties in partnership accounting: *Clark* v. *Ritter*. 59 Cal. 669. Parties omitted on such bill are not affected: *Santa Clara Ass'n* v. *Quicksilver Co.*, 17 Fed. 657.

11. Necessary parties to bill to compel assignment of lease held by directors against the right of the corporation: *Bengley* v. *Wheeler*, 45 Mich. 493.

12. Before stockholder can sue in his own name he must show effort at relief within the corporation: *Foote* v. *Cunard Co.*, 17 Fed. 46; *Dimpfell* v. *Ohio & M. Ry.*, 94 U. S. 209.

13. In action to procure transfer of stock the corporation is a proper party defendant: *Johnson* v. *Kirby*, 3 West C. R. 482; 4 Pac. 458.

14. When two divert water severally a joint action can not be maintained against them: *Evans* v. *Ross*, 8 Pac. 88.

15. Refusal of nominal plaintiff to authorize suit: *Kimmins* v. *Wilson*, 2 M. R. 159.

COLEMAN V. COLEMAN.

(19 Pennsylvania State, 100. B. & W. L. C. 260, Supreme Court. 1852.)

[1] **Waiver of right to part.** The right of partition is a beneficial incident of tenancies in common, but it may be waived by agreement of the parties in interest.

[2] **Agreement barring partition of Cornwall ore banks—Faults.** In 1787 tenants in common of certain lands, furnaces and forges of irregular deposits of iron ore unequally distributed over three contiguous hills the deposits differing greatly in quantity and quality in the several places where they were worked, broken in continuity by faults, and showing indications of the possibility of concentrating as they descended from the different points open on the surface, by articles of agreement jointly, appointed arbitrators to make partition of all the lands except the "mine hills" containing these deposits. Upon a previous effort to make partition of all the land, the arbitrators had reported that no just and equal partition of these ore deposits could be made. Upon the report of the latter arbitrators under the agreement amicable actions of partition were entered, and the court decreed accordingly, parting all the lands except the Bingham tract with forty acres adjoining, and the Cornwall ore banks, of which it was decreed by the court that they do still remain undivided, to be held by the parties as tenants in common according to their respective shares, and to the covenants and articles in the said agreements. The said agreements "had not only provided for partition of part of the land, but also that the ore banks not parted should remain together and undivided, and declaring it to be the intent of the agreement that neither of the parties should interrupt either of the other parties at any mine hole by them opened, and occupied for the purpose of raising iron ore. Under this decree the original owners, their heirs and assigns, worked the mines until 1851. In that year partition was sought, but the Supreme Court *held*, that the partition made in 1787 by the agreement of the parties in interest and decreed upon by the court, was binding on their successors in the title, not only because of the judgment of the court under which they claim, but because the covenants in the agreement of 1787 were real and ran with the land, though the words "heirs and assigns" were not used. Even if the covenants did not so run with the land as to give a right of action to an heir or alienee, they would serve to defeat this action for partition. The agreement of 1787 and the judicial proceedings had thereon constitute a bar to this action.

Partition not set aside as to single tract. The continuance of the mine hills in common after the covenants between the parties and the decree of the court became the consideration for submitting to the partition of the rest of the estate. The implied warranty which attends partition

[1] *Avery* v. *Payne*, 12 Mich. 540.

[2] *Blewett* v. *Coleman*, 11 M. R. 160; note, 3 M. R. 434.

attached in this case; and if what was done as to the mine hills were to be overthrown, it would destroy the whole of the partition. If the rest of the estate be held in severalty by virtue of the partition, by virtue of the same proceeding the mine hills are to be held in common.

Covenant not to part. The words contained in said agreement "shall remain together and undivided as a tenancy in common," construed to mean a tenancy in common not for the present nor forever, but as long as the objects and purposes of the covenant in which they occur are in process of fulfillment, and so far they bar the action of partition.

Error to the Common Pleas of Lebanon County.

The writ in this case issued to the Court of Common Pleas of Lebanon County, to remove the record and proceedings in a certain action of partition wherein Robert Coleman and George Dawson Coleman were plaintiffs, and Robert W. Coleman William Coleman, Edward B. Grubb and Clement B. Grubb (plaintiffs in error) were defendants, and in which Henry P. Robeson and Clement Brooks were admitted to defend *pro inter esse sui* but not to become parties.

PEARSON, J., directed a judgment *quod partitio fiat* to be entered, in consequence of which this writ of error was sued.

The plaintiffs Robert Coleman and George D. Coleman, brought the action of partition to August term, 1851, to have partition made of three contiguous hills in Lebanon county, usually known as the Cornwall Ore Banks and Mine Hills, and severally known as the big mine or large iron hill, the middle hill and the grassy hill. From these ore banks the respective furnaces of these parties, and of those under whom they claimed, had been supplied with ore for above fifty years. The ore banks and mine hills consist of three hills, separated by narrow valleys, and containing in all about one hundred and eight acres. The surface land is uncultivated and of little value, but it is underlaid by a deposit of apparently large quantities of iron ore, which is not equally distributed under the surface of the ground. It was alleged that the ore in the different hills is of different qualities or kinds, and that the iron ore in the same hill differs in quality.

The plaintiffs, in their declaration, alleged these ore banks and mine hills to be held together and undivided between the plaintiffs and defendants, setting out the courses and distances of the ore banks, and that the plaintiffs were entitled to have

fifteen forty-eighth parts, and the said Robert B. Coleman and William Coleman to have twenty-five forty-eighth parts, and the said E. B. Grubb and C. B. Grubb to have eight forty-eighth parts; the whole into forty-eight parts to be divided; and the plaintiffs demanded partition thereof accordingly.

On 10th September, 1851, R. W. Coleman and W. Coleman plead *non tenent insimul;* E. B. and C. B. Grubb plead the same. Robeson and Brooke, by their counsel, asked leave to become parties and to plead *pro inter esse suí;* their interest in the premises being set out in their statement. The court permitted them to appear by counsel and be heard, so as to defend their interest in the premises, but not to become parties to the proceedings. Various other pleas were filed, and also demurrers to special pleas; but the court directed all to be stricken off, and the case to be tried on the general issue.

For the material facts as set out in the special pleas, and as disclosed by the evidence, see the opinion of WOODWARD, J.

A jury was called, and under the charge of PEARSON, J., on 12th April, 1852, rendered verdict for the plaintiffs, that they have partition of the premises demanded in their writ, except as to a house and lot of ground, as to which proof had been given that it was held adversely by one of the defendants.

Judgment *quod partitio fiat* was entered.

Error was assigned to the judgment of the court, and to other matters.

REYNOLDS, WEIDMAN, and MEREDITH, were for plaintiffs in error.

HUGHES, KUNKEL, and PENROSE, for E. B. and C. B. Grubb; MCCORMICK and PENROSE, for Robeson and Brooke.

KLINE and MORRIS were for R. Coleman and George D. Coleman, plaintiffs below and defendants in error.

The opinion of the court, filed September 9, 1852, was delivered by WOODWARD, J.

The principal ground of defense against this action of partition is found in the agreement of 30th August, 1787. It is

insisted, on the part of the plaintiffs in error, who were defendants below, that the instrument established a permanent tenancy in common in the ore banks or mine hills, and that partition of these can not be had without violating the covenant of the parties, and sacrificing important interests which depend on its maintenance. On the part of the defendants in error, who were plaintiffs below, it is contended that the agreement of 1787 was not intended to establish *permanent* relations between the parties, and that there is nothing in it to deprive them of the remedies which are incidental to tenancies in common. The construction of that instrument, therefore, is the first thing in this voluminous record to engage our attention. We must first ascertain what the parties *meant* by their contract, and then we shall be prepared to give it due effect.

The parties to the agreement, or covenant, of 30th August, 1787, were three: Curtis Grubb, owner of one half of Cornwall Furnace and its appurtenances, and one third of Hopewell Forges, situated on said estate; Robert Coleman, owner of the Elizabeth Furnace estate, and of one sixth of Cornwall, and of one third of Hopewell Forges; and the testamentary guardians of Burd Grubb and Henry Bates Grubb, who were owners of one third of Cornwall Furnace, and one third of Hopewell Forges. The ore banks and mine hills, of which partition is sought in this action, were part of the Cornwall Furnace estate, and before the death of Peter Grubb, the ancestor of Burd and Henry Bates Grubb, he, his brother Curtis Grubb, and Robert Coleman for Cornwall Furnace, Robert Coleman for Elizabeth Furnace, and Peter Grubb for Mount Hope Furnace, held the said ore banks and mine hills, to supply the same respectively with iron ore, as they held the woodland belonging to the said furnaces respectively for the supply of charcoal for the manufacture of iron; and, for the purpose of such supply of iron ore and charcoal, the said ore banks and mine hills, and said woodlands respectively, had been continually held with, and as appurtenances to, and parcel of, the said furnaces respectively, with the full knowledge and consent of the owners. Two former efforts had been made to part these estates into severalty—one by agreement of 8th December, 1785, of the parties then in interest, the

other by agreement of 6th May, 1786; and in both of these agreements the mine hills, like the rest of the estate, were to be divided into three equal parts—*two equal third parts thereof, considering quantity and quality*, to be assigned and allotted to Curtis Grubb and Robert Coleman, according to their several shares, and *the other one third equal part thereof* to be assigned and allotted to the said Peter Grubb, to be by them held respectively in severalty. This stipulation in these prior agreements is worthy of observation, as manifesting the intention and desire of the parties that the mine hills should continue to be used and enjoyed as appurtenant to each of the furnaces and forges held in common.

It is apparent that no thought was entertained of separating any one of the establishments from the common fountain of ore which was the element of life and wealth to them all. Partition of the mine hills was indeed to be had, but it was to be partition into "*three equal parts, considering quantity and quality*," a result which, had it proved attainable, would have been mutually beneficial, for it would have given to each owner in severalty a competent share of ore for the use of the residue of his estate. But, after the fullest investigation by men qualified for the duty, such partition was found impossible; and this discovery led to the agreement of 30th August, 1787, which is the document now to be construed.

The parties recite that the former agreement can not be carried into execution without the greatest injustice to some of the parties, and that the same had been so represented by the persons appointed in the said agreement to make partition. "Therefore, in order to remove all difficulties," and to assign and allot the premises according to the real interests and convenience of the several parties, this agreement was made, substantially re-affirming that of 6th May, 1786, except as to the mine hills, which, in tead of being divided, were to remain "together and undivided, as a tenancy in common," the parties not to interfere with or interrupt each other at any mine hole by them opened and occupied for the purpose of raising iron ore. Thus, we see that the parties made this agreement as the only practicable mode of affecting partition of the whole estate.

It will help us, in construing their covenant, to consider a

little in detail some of the "*difficulties*" which they meant to obviate by this arrangement. They were, *first* and chiefly, the peculiarities in the formation of these hills. They are described as enveloped in walls of trap-rock, indicating at the surface, by their angles of position, that they came together; but whether they did not expand, instead of meet, beneath the surface was uncertain. From these walls irregular sheets or veins of trap-rock were found extending into the iron ore, forming irregular masses of both ore and rock, and in many instances cutting off the ore entirely, so as to render its continuance in a particular direction extremely uncertain. Besides, the ore in the different hills is of different qualities or kinds, and various kinds of ore are found in the same hill, a mixture of which is necessary to make good iron. The ore becomes exhausted at particular places, where it is so mingled with sulphur and copper as not to be fit for use.

Such was the structure of these hills; and is it strange that they were regarded as indivisible into "three equal parts, considering quantity and quality?" Geology and mineralogy were unknown as sciences at that day; but even in their present development they would be incompetent to guide an inquest to such a partition of these shapeless and unstratified masses of rock and ore. This difficulty, then, was inherent in the subject-matter, and however it might be dealt with now, was regarded as insuperable in 1787. Unless violence be done to the intention of the parties, their agreement must be so construed as to remove this difficulty. That is, the physical peculiarities of these hills must not be permitted to prevent partition of the rest of the estate, and when the rest of the estate shall be divided, each part must have participation in the varied treasures of the hills. 2d. The state of the law of partition in Pennsylvania constituted another of the "difficulties" of the parties. At common law, there was no writ of partition between tenants in common. It was given by the statute of 31 Henry VIII, which was extended to Pennsylvania. In 1772, an act of assembly empowered the courts of this State to issue writs of partition, and this was all the legislation in force here at the time this agreement was made. By an act of 1799, and various subsequent acts of assembly, the powers of the courts are enlarged, and proceedings in partition

fully regulated; and if, upon inquisition, the estate be found incapable of division without prejudice to or spoiling the whole, it is appraised and valued; if divided at all, the parts are appraised, tenants in common are called in to elect to take or refuse at the appraised value, unequal parts are equalized by owelty, and if all the tenants in common refuse to take, the estate is sold and the price divided. Under these acts of assembly, partition or a sale could not be compelled of an estate situated as this was in 1787; but at that time there was no provision in force for valuation, election, owelty or sale. The parties contracted with a view to the law as it then stood. We had no court of chancery to administer the statute of Henry VIII, and the statute provided only for equal partition among tenants in common, as estates of coparceners were divisible at common law. Such a division the parties believed to be impossible, and they accordingly undertook to do that for themselves which the law was incapable of doing for them. Had the law authorized a valuation of purparts, and enabled the court to order a sale, they would not, peradventure, have come into the agreement to divide part of their estate and hold the rest in common, for some might have preferred a sale. 3d. Another difficulty sought to be avoided arose out of the reservation of an incorporeal hereditament in the deed of 9th May, 1786, Peter Grubb and wife to Robert Coleman, for an undivided sixth of Cornwall Furnace, and an undivided third of Hopewell Forges and appurtenances. This reservation was in these words: "Saving and excepting unto the said Peter Grubb, Jr., his heirs and assigns forever, the right, liberty, and privilege, at all times thereafter, of entering upon the premises, and of digging, raising, and hauling away a sufficient quantity of iron ore for the supply of any one furnace, at the election of Peter Grubb, Jr., his heirs and assigns, at all times thereafter." This was a right reserved of entering upon 9,669 acres of land, and taking ore for the supply of any one furnace. What would have become of this easement on partition among the tenants in common of the estate out of which it was reserved? Would Peter Grubb have been limited to the one sixth part that might have been set out in severalty to his grantee, Robert Coleman? This would have shorn the incorporeal hereditament of five sixths

of its value, without the consent of the owner of it. Would Peter Grubb have been permitted to enter and take ore from any part of the premises, as before partition? This would have worked a prejudice and surcharge to the other tenants, for, unquestionably, the grant to Coleman and the reservation to Peter Grubb constituted but one "stock," as in *Lord Mountjoy's Case;* and together they might not take more than one sixth. See that case in Thomas' Co. Litt. Vol. 1, p. 536. Had the parties contemplated a *sale* of the estate, or the taking of it by one tenant in common at a valuation, this easement would have followed the estate, like an incumbrance; but they had no thought of separating any one of themselves from the mine hills, by sale or valuation. They looked only to a partition of those hills among themselves, in equal parts, "considering quantity and quality," and in the way of such a measure stood this easement, as a formidable difficulty.

Such were the "*difficulties*" which the parties, on a full investigation, saw in the way of such partition as was contemplated in the agreements of 1785 and 1786. They made the agreement of 1787 to avoid these difficulties. And as the difficulties all pertain to the mine hills, they agreed to divide the rest of the estate, and not to divide these: "Provided always, and it is hereby agreed, that the ore banks belonging to Cornwall Furnace shall remain together and undivided as a tenancy in common, the said Curtis Grubb being entitled to three sixth parts, the said Robert Coleman being entitled to one sixth part thereof, and the said minor children being entitled to the remaining two sixth parts thereof; and that, for this purpose, an accurate survey shall be made of the said ore banks and hills, if not already done; and it is hereby declared to be the true intent and meaning hereof, that neither of the said parties, their agents or workmen, shall interfere with or interrupt either of the other parties at the mine hole by them opened and occupied for the purpose of raising iron ore." Such were their words.

I do not propose to follow counsel in a critical analysis of the words "*remain, together, undivided,*" in the above proviso, for it is a canon of interpretation that too much regard be not had to the native and proper definition, signification, and acceptance of words and sentences, to pervert the simple in-

tentions of the parties. The lawyer who forms his opinion on the mere words without the context, goes only skin deep into the argument. (Touchstone, 87.)

We have seen what the difficulties in the way of parting this estate into severalty were, and that they were inherent and enduring. So long as the ore should last, the estate would be incapable of equal partition; and yet so long as these furnaces and forges should continue to manufacture iron, that ore would be wanted. They used words to obviate the difficulty. The remedy was commensurate with the evil. Experience had proved it possible for these tenants in common to supply the wants of their respective establishments by occupying, each his mine hole; and the fullest investigation had demonstrated that this was the nearest to a partition in severalty to which these hills could be brought, without "the greatest injustice to some of the parties." Just in that condition, therefore, shall the mine hills be left: "*remain*" is the word. How long, it is asked? I answer, as long as the "difficulties" remain. As long as the ore endures and continues to be wrought in these furnaces and forges. "Remain together, undivided," not for a day, or month, or year, so that at any of these intervals either party should be at liberty to sue out partition, and bring on the difficulties again, but these words meant that partition should not be sought whilst the difficulties, the convenience, and the interests of the parties as iron masters continued as they were. We see in these words, when taken in connection with the history of the case, a clear intention to exempt the mine hills from partition, and continue the participation of the parties in the manner experience had suggested and established. If the ore should fail, (a contingency which at that day may have been deemed probable,) or the manufacture of iron on the estate should cease, the agreement would have accomplished its mission, and the hills might then be parted. But, until the happening of one or the other of these events, they were to remain appurtenant to the rest of the estate as before. The stipulation about the Bingham tract is an example of a more *temporary*, as that about the water right is a more *permanent*, arrangement than this concerning the mine hills. The Bingham tract was to remain undivided "for *the present*," indicat-

ing a right to partition at any convenient time future. The water right was to remain to Curtis Grubb and Robert Coleman, their *heirs and assigns forever*. This was assignment to them of the water right in fee. But the mine hills should remain undivided, not only for the present, but whilst existing circumstances continued; and yet not necessarily *forever*, for these circumstances might cease to exist.

That this is the true construction of the agreement may be very clearly inferred from the conduct of the parties and those claiming under them.

For more than sixty years they have used the mine hills as appurtenant to their respective properties. They have invested large sums of money in purchases and improvements made on the faith of the relation established by this agreement. Their expensive and valuable furnaces and forges—valuable because of their connection with this fountain of supply—will, if severed now, be left on their hands only to decay, and embarrassment and ruin will befall the productive industry in which they are engaged. Did they stake these important interests on the relations of a day? Did they understand that the connection of some of these establishments with the mine hills was to cease whenever the caprice or the interests of any co-tenant should dictate a demand for partition?

The construction of all contracts, whether sealed or simple, should be reasonable, and as near the minds and apparent intents of the parties as possible. Words are primarily the proper signs of their ideas; but, when the meaning of their words is disputed, what higher evidence of their intention can we obtain than their acts and conduct? These are a practical interpretation of their agreement; and we should do violence, both to their intentions and their interests, if we failed to adopt that construction to which not only their *words* but their *acts* so unequivocally point.

The interpretation of the writing being such as we have expressed, it is next to be observed that the parties made it part of a judgment in partition.

By the agreement of 6th May, 1786, amicable actions of partition were to be entered in Lancaster and Dauphin counties, and partition was to be decreed agreeably to the report

of the persons appointed to make partition; and that report was to be binding and conclusive on all parties to the agreement, and no "obstructions, either in court or elsewhere, were to be made by any of the said parties, to the carrying of said report into full and complete effect, and making the said partition perfect and comformable thereto." These provisions were carried into the agreement of 30th August, 1787, by the words, "and it is further agreed that the article in the former agreement respecting the entry of amicable action in case and partition, and the report of the persons before appointed, and process and proceedings therein, shall be fully adopted according to the true intent and meaning of this agreement."

The persons named in these two agreements proceeded to make partition by assigning Cornwall Furnace and certain designated tracts of land to Curtis Grubb and Robert Coleman, three undivided fourths to the former and one to the latter; Union Forge situated on Swatara Creek, with a contiguous tract of land, to Curtis Grubb; two certain houses and lots of land in the town of Lebanon to Robert Coleman; Hopewell Forges with certain designated tracts of land, to Burd Grubb and Henry Bates Grubb; and, for equality of partition, they awarded certain sums of money to be paid among the parties, and then added the following: "And we do further report that the tract of land called Bingham's place, at Conewaga, together with a small tract of fifty acres of land adjoining thereto, and *also the ore banks and mine hills of Cornwall Furnace, do still remain undivided, to be held by the said Curtis Grubb, Robert Coleman, Burd Grubb, and Henry Bates Grubb, as tenants in common, according to their respective shares and to the covenants and articles in the said agreement hereinafter recited contained.*" This report, so made, was confirmed in the Courts of Common Pleas of Lancaster and Dauphin Counties, (then including Lebanon) on the ——— day of November, 1787, and partition in said action was fully executed, and the parties entered upon the purparts respectively assigned to them, which they and those claiming under them have continued to hold ever since.

Thus the agreement of 1787 became the judgment of a court of record. These titles afterward, by sundry conveyances,

united in Robert Coleman and Henry B. Grubb, who, on 30th November, 1802, entered into an agreement for the amicable partition of Mount Hope Furnace and Hopewell Forges; but "the ore banks," said the agreement, "shall be excluded from said partition, and shall not be taken into consideration by said inquest." By this partition, Hopewell Forges and 2,311½ acres of land were allotted to Henry Bates Grubb. The ore banks and mine hills continued to be used as appurtenant to these properties.

Robert Coleman made his will on the 3d March, 1822, and died 3d September, 1825. He devised Cornwall Furnace, Elizabeth Furnace and Hopewell Forge, and all his right, title and interest in the ore banks and mine hills, to his three sons, William, James, and Edward.

By virtue of conveyances, descents cast, and actions of partition, Elizabeth Furnace, with its appurtenances, became vested in the plaintiffs below, defendants in error, Robert Coleman and George Dawson Coleman; Cornwall Furnace, with its appurtenances, in Robert W. Coleman; Colebrook Furnace, with its appurtenances, in William Coleman; and Mount Hope Furnace, with its appurtenances, in Edward B. and Clement B. Grubb, defendants below and plaintiffs in error. All these establishments continued to be used for the manufacture of iron.

The incorporeal hereditament reserved in the deed of 9th May, 1786, from Peter Grubb to Robert Coleman, became vested in Henry P. Robeson and Clement Brooke; and they use it to supply Reading Furnace with ore.

The parties before us, it is thus seen, derive their titles through *that judgment in partition in 1787 which was "according to the covenants and agreements" of 30th August, 1787.* The covenant of 1787 was inwrought into the titles of the parties by the judgment of the law, whose decree was, that the partition thus made should remain firm and stable forever. That decree is conclusive until reversed or set aside. If mistake or fraud be committed in making up a record, it can neither be averred nor proved in a collateral proceeding, nor in an action founded on it. The record must be received as absolute verity, and speak for itself. If wrong, the only mode of having it corrected or set right is by an application to the court where the judgment was had, of which the rec-

ord is a memorial. In no other manner can a party or a privy to the judgment be relieved, as I apprehend, in any case: *Morris* v. *Galbraith*, 8 Watts, 168; *Hoffman* v. *Coster*, 2 Whar. 474.

A covenant, founded in sound reason and experienced necessities, bound the parties to hold the mine hills together, for the use of the whole estate. A decree of a court of justice in partition recognized and incorporated that covenant. As between the parties, the continuance of the mine hills in common became a consideration for submitting to the partition of the rest of the estate. The implied warranty which attends partition attached here, and if now all that was done is to be overthrown as to the mine hills, it must necessarily destroy the whole of that partition: *Feather* v. *Strohoecker*, 3 Penn. R. 506.

If these parties are not to hold the mine hills as tenants in common, then they no longer hold their respective parts of the rest of the estate as tenants in severalty. But if they hold these parts in severalty by virtue of a record unimpeachable collaterally, then by the same record they are to hold the mine hills in common. That record is as sure for the one purpose as the other. And the decree fixed the *mode of enjoyment*, as well as the tenancy in common. Each party was to occupy his appropriate mine hole. Insurmountable difficulties being found in the way of dividing this part of your estate, we obviate them by decreeing that you hold it in common, as appurtenant to each of your estates in severalty, and that you use each his proper mine hole. The ore taken by each can then be estimated, and equity will compel an account among you for the adjustment of balances. Such, in effect, was the language which the decree of the court addressed to the tenants in 1787, and has ever since sounded in the ears of their successors. That voice is as potential now as it was then, and these parties are as much bound to heed it as their ancestors were, for it is the voice of the law, echoing only the terms of the covenant under which they hold their estates.

This was, in effect, partition of the *profits* of the mine hills. The soil was valueless. The ore was the object to be secured and this was indivisible into equal parts. The law did not enable one tenant to compel a sale, and there was the out-

standing easement which was not subject to partition. What could be done in such circumstances except that which was done—make the hills an appurtenant of each several property, and secure to each tenant participation in the products, in the manner their convenience and experience had suggested.

Partition thus made of the usufruct is not without analogies and direct authority in law. We have said that partition at common law was confined to coparceners, but inasmuch as the statute of 31 Henry VIII gave partition to tenants in common in "like manner and form as coparceners by the common law of this realm have been and are compelled to do," principles drawn from the law of partition among *parceners* are applicable to partition among *tenants in common*. Especially is this the case in Pennsylvania, where our statutes of inheritance and distribution have substituted tenancy in common for the English coparcenary. What, then, was the "manner and form" in which parceners had partition of the profits of impartible estates?

In speaking of indivisible inheritances, Lord Coke asks, what shall become of them? He first answers that the eldest shall have them, and others shall have an allowance in value in some other of the inheritance.

But what if the common ancestor left no other inheritance to give anything in allowance? It is answered that one coparcener shall have the inheritance for a time and the other for a like time. Or, in case of a piscary, one may have one fish and the other the second one, or the one may have the first draught and the second the second draught. If it be a park, one may have the first beast, and the second the second. If a mill, one to have it for a time, and the other for a like time, or the one, one toll-dish, and the other the second. And this, he adds, appears to be the ancient law: Thomas' Coke Litt. Vol. 1, p. 537. And says Littleton: It is to be understood that partition may be made in divers manners. *Modus et conventio vincunt legem. Pacto aliquid licitum est, quod sine pacto non admittur.*

In Allnatt on Partition, 3–5 Law Library, it is laid down that there may be partition in *effect*, and so as to give to each parcener a species of enjoyment in severalty without any division of the land.

In *Salisbury* v. *Phillips*, 1 Salkeld, 43, Lord Holt said: When the *thing* and its *profits* are the same, partition of the *profits* is partition of the *thing*. See also *Warner* v. *Baynes*, Ambler 589; 6 Monroe, 179.

In the case of *Conant* v. *Smith*, 1 Aiken, 67, in which an *ore bed* similar to this was attempted to be brought into partition, the Supreme Court of Vermont denied both partition and a sale on the ground that neither could be had without injustice to the parties, and suggested that a court of equity had the power to regulate the enjoyment of the property between the owners, by restricting them to the proportion of their respective interests, by compelling accounts between them, and by appointing a common receiver for all parties.

That our courts possess the equity powers here referred to can not be doubted, since the act of assembly of 25th April, 1850, Purdon, the 24th and 25th sections of which confer upon the courts of common pleas equity jurisdiction to compel accounts between tenants in common of "coal or iron ore mines, or minerals."

The partition thus made in 1787, by the agreement of the parties in interest, with the sanction of the court having jurisdiction, and in accordance with law, is binding on the successors in the title, not only because of the judgment of a court in partition, under which they claim, but because the covenants of 1787 were real, and ran with the land, though the words "heirs and assigns" were not used. See *Packenham's Case*, cited in *Spencer's Case*, 3 Coke, 16, and Mr. Hare's note in 1 Smith's Leading Cases, p. 108; Thomas' Coke Litt. Vol. 2, p. 247–49. Even if the covenant did not so run with the land as to give a right of action to an heir or alienee, it would serve to rebut this action, for the law is, in regard to the *implied* warranty which annexes itself to exchange and partition, that though it does not extend to assignees, yet the assignee shall rebut. See Note to Coke Litt. p. 249. Much more may an express covenant be set up by a privy in estate against the very action which it was the object of the covenant to exclude, though no words of perpetuity were used.

We have thus demonstrated satisfactorily, at least to our own minds, that the agreement of 30th August, 1787, and the

judicial proceedings had pursuant to it, constitute an insuperable bar to this action. It follows that the court below were in error in rendering judgment for the plaintiffs.

Against these conclusions it is urged that the partition of 1787 left the mine hills a tenancy in common, and that partition is an inseparable incident of the estate of tenants in common, and therefore these plaintiffs should not be estopped.

But it must be apparent that this action is nothing more than an attempt to have a second partition of that which has already been the subject of partition.

A large estate held in common, and involving various and complicated interests, was brought into severalty by reason of the exemption of the hills from the ordinary course of partition. Partition indeed was virtually made of them, and yet the plaintiffs, not proposing to re-divide the whole estate, would destroy the foundation on which the former partition rests, by subjecting the mine hills to an actual division or sale. This can not be permitted. Estates in common are undoubtedly meliorated by partition into severalty, and the interests of society require the statutes of partition to be liberally construed.

We have no doubt that any mineral lands held in common, whatever the peculiarities of their structure, are subject to partition under our acts of assembly; for, if upon inquest it is found they can not be divided without prejudice to or spoiling the whole, they may be ordered to one or more of the tenants at a valuation, or be sold and the price divided. But neither the letter nor the policy of our statutes demand partition of an estate in circumstances such as attend these hills of ore. The incidental right, which the plaintiffs claim is gone, was surrendered by those under whom they claim, and they are enjoying, in the severalty of their estates, the consideration of that surrender.

There are many other matters suggested in the able and elaborate argument of this cause which we do not take space to discuss. Nor do we notice in detail the errors assigned to the opinion of the court below, because the capital error into which the court fell was in sustaining the plaintiffs' action.

We put our judgment on the covenant of the persons under

whom the parties litigant hold, and the judicial proceedings had thereon, and we refuse any further partition of these mine hills, because as yet that covenant is operative and the hills must "remain together and undivided as a tenancy in common."

Judgment reversed.

CONANT ET AL. V. SMITH ET AL.

(1 Aiken, 67. Supreme Court of Vermont, 1826.)

[1] **Partition of ore bed refused.** The court will not order partition of real estate held in common, where the value of the several parts can not be ascertained, as in the case of an ore bed.

Sale, when not decreed. Nor will they in such case order a *sale* thereof or an assignment to one of the parties, though authorized by the statute, if equal or better justice can be obtained in another way; the proper remedy of the party aggrieved is by application to the court of chancery.

Costs in partition under the statute can not be recovered where there is no question as to the title of the respective parties.

This was a case for partition, brought under the act entitled "An act for the partition of real estate, in certain cases."

The petitioners set forth in their petition, that they were the owners, in fee simple, of fifteenth sixteenths, and the petitionees of one sixteenth, of a certain tract of land in Brandon containing an ore bed, as tenants in common, and that they were desirous of holding and enjoying their portion in severalty.

They further represented that the said tract could not be divided without great inconvenience to the parties interested, (the chief value thereof consisting in the ore therein,) and therefore prayed the court to order partition of said tract; or, that the whole of said tract might be assigned to them, they paying such sum or sums of money, at such time or times and in such manner, to the petitionees, as the commissioners to

[1] *Lenfers* v. *Henke*, 5 M. R. 68.

be appointed by the court should judge just and reasonable, agreeably to the statute in such case made and provided.

From the evidence it appeared that the tract in question contained about thirty-six acres; that the ore, so far as discovered, was confined to about two acres, and the residue of the land worth but little; that the ore is of the description called bog-ore, and grows again after being dug out; and that the bed has been discovered fifteen or sixteen years, and wrought, in places, from two to fifty or sixty feet deep. That the petitionees' furnace is much nearer to the ore bed than the petitioner's furnace; that for some time past the petitionees had dug much more ore than the petitioners, in proportion to their respective shares, and that considerable difficulty had occurred between the parties in consequence of their respective diggings. The title of the parties was admitted to be as set forth in the petition.

CHAS. K. WILLIAMS, for the petitioners.

ROBERT B. BATES, for the petitionees.

The opinion of the court was delivered by ROYCE, J.

This is a petition for partition of a small piece of land, the value of which consists chiefly in an ore bed, which for several years has been known to exist in a part of the tract.

A suggestion is made that it may be difficult to divide the bed to advantage; and the scope and design of the petition seems rather to obtain an assignment of the defendants' share, than an actual division of the estate. The situation and quality of this property is such as to justify the court in declining to order a partition or sale. The exact extent of the ore bed is probably not yet known; and much less is the comparative depth and richness of its several parts. It would therefore be very hazardous to attempt a final division of the land itself; and to order a division in point of time, by directing the parties to improve the whole in succession, according to their interests, would operate to destroy all benefit to the owners of a small share. And then, to direct a sale of the defendants' share without their consent, though authorized by the statute,

is against common right and ought to be avoided, if equal or better justice can be obtained in another way. The court of chancery has powers to preserve the rights of the parties, and avoid all these evils. They can regulate the enjoyment of this property between the owners by restricting them to the proportion of their respective interests, by compelling accounts between them, and by appointing a common receiver for all parties. It is further to be recollected that the orders of that court are not necessarily peremptory and final, but may be altered from time to time, and suited to the varying state of the subject and condition of the parties. To that jurisdiction we must therefore refer the petitioners and refuse their present application.

Bates now moved the court that the petitionees be allowed their costs.

HUTCHINSON, J., considered it a case in which it was *discretionary* with the court either to allow costs or not.

ROYCE, J.—This being a case where no question is made about the respective *titles* of the parties as set forth in the petition, and the statute having given costs *upon a trial of the title*, it is to be construed as having denied costs in other cases.

In this opinion the other judges concurred, and no costs were allowed.

CANFIELD ET AL. v. FORD.

(28 Barbour, 336. Supreme Court of New York, 1858.)

Estate in minerals, a fee simple and partible. The grantee, by deed of the mines and minerals under land, has an estate of inheritance, and an estate in fee simple in the minerals, though another have the fee simple in the soil, and such an estate as is capable of partition under the statutes, though a mere license to mine may be non-partible.

Corporeal hereditament. An estate in mines is a corporeal hereditament.

The Supreme Court has common law jurisdiction to part real estate.

The common grantor of tenants in common is not a necessary party in a partition suit and has no interest whatever therein.

Lands, tenements and hereditaments, defined.

This was an appeal from a judgment entered upon the trial of the action at the St. Lawrence circuit, before a justice of this court, without a jury, in June, 1857. The action was for partition of real estate. Jonathan Fuller was originally the owner in fee simple, and the common source of title to the lands and premises in question. On the 6th of November, 1847, Fuller and wife conveyed to Chillion Ford, the defendant, the interest in the lands in question, in three parcels described in the deed. The terms of the deed with the covenants therein sufficiently appear in the opinion.

Chillion Ford, on the 8th of February, 1856, by a like deed as to form and covenants, conveyed to John Canfield one undivided half of his interest in the said three parcels of land. On the 19th of January, 1857, John Canfield and wife, by a like deed as to form and covenants, conveyed two undivided third parts of his one half interest in said estate to the plaintiff, Richard B. Chapman. Canfield and Chapman then bring an action for partition against Ford, the owner of the other half. The respective interests of the parties are correctly set forth in the complaint. The other facts in the case are fully stated in the opinion of the court.

BISHOP PERKINS, for the appellant.

W. C. BROWN, for the respondents.

By the Court, POTTER, J.

The only real question to be decided in this case is, whether the parties to this action have such an estate or interest in the lands in question as is susceptible of partition by action.

It is conceded that Jonathan Fuller was the original source of title, and that he owned the entire estate in fee simple, in quantity and quality, and that the conveyance from him to the defendant, and from the defendant Ford to Canfield and from Canfield to Chapman, in form and covenants, are alike. It is therefore sufficient to set forth one of these conveyances. On the 6th of November, 1847, Fuller and wife conveyed by deed to Chillion Ford, the defendant, "and to his heirs and

assigns forever, *all* the mines, ores, minerals, and metals, lying or being in, or upon the land of the parties of the first part, situate, lying and being in the town of Depeyster, in the county of St. Lawrence, (describing three parcels of land,) together with the right to raise, work and carry away said mines, ores, minerals and metals, and the right to put up all buildings, and to use all lands that may be necessary for the purposes aforesaid, and the right of ingress and egress thereto and therefrom for the purpose of raising, digging and working and carrying away said mines, ores, minerals and metals, as aforesaid, and all the estate, right, title, interest, claim and demand whatsoever of the parties of the first part of, in and to the above granted mines, ores, minerals and metals. To have and to hold the above mentioned and described mines, ores, minerals and metals, to the said party of the second part, his heirs and assigns forever," with a covenant to warrant and defend the same, in the usual form of the deed of warranty.

The revised statutes provide that when several persons shall hold and be in possession of any *lands, tenements or hereditaments*, as joint tenants, or as tenants in common, in which one or more of them shall have estates of *inheritance*, or for life or lives, or for years, any one or more of such persons, being of full age, may apply to the court for a division or partition of such premises, according to the rights of the respective parties interested therein, and for sale of such premises, if it shall appear that a partition can not be made without great prejudice to the owners. Is the interest in question such an interest as comes within the meaning and intent of this statute? Either of the terms employed in this statute would seem to include the estate of the parties in this action.

"Land," in its most general sense, comprehends any ground, soil or earth whatsoever, as meadow, pastures, woods, moors, waters, marshes, furzes and heaths: Co. Litt., 4 A. It includes all things of a permanent and substantial nature; not only the face of the earth, but everything under it or over it: 2 Bl. Com. 18. "*Cujus est solum ejus est usque ad cœlum et ad inferos.*" "Tenements" is a word of greater meaning and extent, sometimes, than land, and includes not only land, but

rents, commons, and several other rights and interests issuing out of or concerning land: 1 Steph. Com. 158–9. "Hereditaments" is a still more comprehensive term in law, and includes whatever may be inherited, corporeal or incorporeal: 2 Bl. Com. 17. These terms, therefore, seem to be comprehensive enough to include the estate in question. I think there can be no doubt that the estate in question is an estate of inheritance. It is so by the very terms and forms of the grant. The difficulty suggested upon the argument was, how to describe this estate, so carved out of the whole fee. If it is an estate that can be partitioned, the precise description is not very material, nor is the question as to what would be the rights of the parties, after partition, at all necessary to be discussed here. The latter question does not arise in this review. The counsel for the defendant has argued, with great force, that the right or interest which was conveyed as above stated is not a fee simple. In this I think he is mistaken, upon authority: 2 R. S., 722, Sec. 2. It is not, however, necessary that it should be a fee simple to entitle to partition. Whatever estate it may be, the owner has such an interest in it that he can maintain trespass *quare clausum fregit* for any wrong done to it: *Worcester* v. *Green*, 2 Pick. 429. True, Lord Coke says, "An inheritance in fee simple expresses the largest estate that a man can have in land." But Littleton says, "This doth extend as well to all fee simples conditional and qualified, as to fee simples pure and absolute, for our author speaketh here of the ampleness and greatness of the estate, and not of the *perdurableness* of the same, and he that hath a fee simple *qualified* hath as ample and great an estate as he that hath a fee simple absolute. So as the diversity appeareth between the quantity and the quality of the estate." Littleton, 18 A. And so, also, Plowden says, "That two fees simple absolute can not be at the same time of one and the self same land." Plowd. 349. That is, the mines, ores and minerals, being land, a man may have a fee simple in them as well as he who holds the soil that remains unconveyed may have a fee simple, for they are not the self same land. A man may have a fee simple not only in lands but also in advowsons, common, estovers, and other incorporeal hereditaments. So, if a man grants to another all woods, underwoods, timber trees, or others, saving the soil, the grantee has a *fee*

to take in "*alieno solo*." Crabbe on Real Property, Sec. 964. The estate so partitioned, therefore, is an estate of inheritance—a fee simple. It is limited in quantity, not in quality. It is carved out of a fee simple absolute, and the latter having lost this quantity of estate is itself qualified to that extent, without losing its quality of a fee simple. The estate in controversy, I think, may also be classified among estates as a "corporeal hereditament," and comes within the definition of that estate, to wit, "such hereditaments as are of a material and tangible nature, such as may be perceived by the senses, consisting wholly of substantial and permanent objects, and may be comprehended under the general denomination of lands only." Steph. Com. 159; Bouv. Dic. 288.

The classes of cases referred to by the learned counsel for the defendant, which may not be partitioned, are cases of mere license, or authority to enter upon another's land, and to do a particular act or series of acts, without possessing any estate in the land. Such interests, it is true, can not be partitioned. This class of cases is nearly allied to, and very often confounded with, a still superior interest in real property, called an "easement," which is described as "a liberty, privilege or advantage in land, existing distinct from an ownership in the soil, and is founded on a grant by deed, or writing, or upon prescription, which supposes one, being a permanent interest in another's land, *without profit*, with a right at all times to enter and enjoy it." 3 Kent's Com. 452. Such an interest, possibly, may not be partitioned.

The distinction between the two classes of cases last above mentioned, and that of a permanent *grant* for a good consideration, of an interest in lands to be used for profit to a man and to his heirs and assigns forever, is palpable. There is still another distinction found in the old law books, existing in regard to estates of *inheritance*. Entire estates of inheritance *not divisible*, and estates that are *divisible*, and yet shall not be parted or divided between coparceners. Among the examples given of them is found the following: "If a man have reasonable estovers, as housebote, haybote, etc., appendant to his freehold, they are so entire, as they shall not be divided between coparceners." Co. 164 B. "So too of a *pischarie incertaine*, or a commons *sauns nombre*, or of a

corody incertaine." Id. Another instance cited by Littleton, of estates that shall not be partitioned, is this: Lord Mountjoy, being seized of the manor of C., did by deed, indented and enrolled, bargain and sell the same to one Browne in fee, in which indenture was contained a clause on the part of Browne, amounting to a grant by him of an interest and inheritance to Lord Mountjoy, his heirs and assigns, *to dig for ore in the lands*, which were a great waste, parcel of the said manor, and to dig for turf, also for the making of alum. In this case three points were resolved upon by all the judges, viz.: First, that this conveyance did amount to a grant of an interest and inheritance to Lord Mountjoy, to dig, etc. Second, that notwithstanding this grant, Browne and his heirs and assigns might dig also, and like to a case of common "*sauns nombre.*" Thirdly, that the Lord Mountjoy might assign his whole interest to one, two or more, but then if there be two or more they could make no *division* of it, but work together with one stock. Co. Litt. 164 B.

It will be seen that the reason given by the judges why partition could not be made in the case above cited, does not at all apply to the case in question. First, the exclusive right or all the right to mine ores, etc., was not granted in that case, but a *mere right or permission to dig*, etc.; the grantor and his assigns might also dig; and second, the extent of the grant being *uncertain* the grantee might *surcharge* to the injury of the tenant of the land. Interests uncertain in their extent could never be partitioned. In the case now in question, the tenant would be bound to take the estate, subject to the terms of the conveyance granting the exclusive right to all the mines, etc., and of the right to put up *all* buildings, and use *all* lands that may be necessary for the purposes expressed, and the right of ingress and egress thereto and therefrom. The terms of the grant, by construction, being taken most strongly against the grantor, and the whole interest in the mines, etc., being conveyed, it is immaterial to the grantor whether one person with fifty or more laborers, or fifty or more persons singly, should dig thereon, provided they use no more of the land than is necessary for the purpose of digging, etc., all the mines, ores, etc. This is a certain grant, and no difficulty occurs in making equality of division.

But if the provisions of our revised statutes are not broad enough to include the power to partition, it has been settled that this court, as now constituted, has common law jurisdiction to partition real estate: Story's Eq. Jur. Sects. 646, 658; *Smith* v. *Smith*, 10 Paige, 470; limited, however, to the power to divide estates certain. It is only necessary, in a court of equity, to entitle to partition, so far as this point is in question, to show that equality can be obtained in value of lands, especially in advantages and profits redounding from each share to the several owners. Allnatt on Part. 10. Whatever is capable of being divided may be the subject of partition in equity: Id. 84.

The only remaining question raised in this case is, whether the owner of the fee qualified in quantity, out of which the estate in question was carved, ought not to be made a party to the action. The statute (2 R. S. 318, Sec. 5) requires that the petition (complaint) shall set forth the rights and titles of all persons interested therein, etc. What interest can Fuller, the grantor of this estate, have in the estate, which by deed he has conveyed away? In the estate sought to be partitioned he has no interest whatever. The partition in no respect affects the title of Fuller. He is not a tenant in common with the parties to the suit. They own separate portions of the estate in severalty.

I think the judgment must be affirmed.

Judgment affirmed.

WILD v. MILNE.

(26 Beavan, 504. The Rolls Court, 1859.)

[1] **Colliery worked in partnership.** On bill to wind up a partnership, the court will not order a partition of mines worked as firm assets, but will order a sale of the entirety, and in this case liberty to the partners severally to bid was allowed.

The plaintiff Wild, the defendant Milne, and the five other co-defendants, were engaged in working a colliery called the

[1] *Hughes* v. *Devlin*, 12 M. R. — ; *Crawshay* v. *Maule*, 11 M. R. 223.

Dean Colliery; they had obtained seven leases of different parts of the property for terms ranging between twenty-one and forty years. There were no articles of partnership and no fixed term for its duration, but the partners were entitled in equal shares to the profits.

In consequence of some disagreements the plaintiff gave notice to dissolve, and instituted this suit against his copartners to have the partnership wound up. It did not allege that there were any debts, but it prayed that the partnership property might be sold and applied in payment of the debts and liabilities, and that the surplus might be divided.

This was resisted by the defendant Milne alone, and the case was now brought on for hearing.

Mr. R. PALMER and Mr. EDDIS, for the plaintiff.

Mr. LLOYD and Mr. FOWLER, for Milne.

Mr. BACON, Jun., for the other defendants, concurred with the plaintiff.

THE MASTER OF THE ROLLS.

I am clearly of opinion that this is an ordinary case of partnership, and that when it is dissolved or terminated any one of the partners is entitled to have the whole assets disposed of. In this case it is admitted that any one can put an end to the partnership; the result is, that that which forms the partnership assets must be disposed of for the purpose of settling the rights between the partners. I consider this established by *Crawshay* v. *Maule*, 1 Swanst. 518, 526, where the distinction between the individual interests of several persons in land, where there is a trading partnership and where there is none, is adverted to. One of the cases points out the singular inconvenience which would follow if I were to direct a sale of the plant and a partition of the land demised. Would the steam engine be included in the division, and, if so, how could it be possible to make a partition of the remainder? Are all the parties to have the use of the shaft, or a right of descending by means of the machinery? The court is compelled, by

the exigency and circumstances of these cases, to direct a sale. I shall therefore make the usual decree, and according to the prayer of the bill direct a sale.

The parties are entitled to an inquiry to ascertain how the partnership property can be most advantageously sold, and whether as a going concern or not.

Liberty to bid may be given to all the partners except the one having the conduct of sale. Appoint a receiver and manager, with liberty to any party to propose himself, without salary.

McGILLIVRAY v. EVANS ET AL.

(27 California, 92. Supreme Court, 1864.)

[1] **Partition of water impracticable—Sale and distribution.** It is utterly impracticable for the court to make a mechanical division of the water running in a ditch, owned by tenants in common and used for mining purposes, in such a manner as to permanently do justice between the parties. The only partition that the court can make, which will definitely and permanently end the dispute of the parties and do justice between them, is to order a sale and distribute the proceeds.

Appeal from the District Court, Ninth Judicial District, Trinity County.

GEORGE CADWALADER, for appellants.

W. W. UPTON, for respondent.

By the Court, SAWYER, J.

This is an action for the partition of the water of a mining ditch, admitted to be owned by the parties as tenants in common. The three defendants are entitled to the first flow of twenty inches when the water is high, which the court finds is to be measured without pressure. But in the summer,

[1] *Lorenz* v. *Jacobs*, 59 Cal. 262.

when the water is low, they are entitled to the first flow of one fourth of the whole, provided one fourth does not exceed twenty inches. The plaintiff is entitled to two fifths, and the defendants to three fifths of the remainder, after the twenty inches, or the one fourth at low water, has been taken out. The answer alleges that as between themselves the twenty inches are owned jointly by all the defendants, and that the three fifths are owned by two of them only—but the court does not find how the defendants hold, as between themselves. The defendants appear to use the water for mining purposes, and the plaintiff formerly used his for irrigating his garden, and for sale to miners—the parties dividing it among themselves. Upon the facts found, the court ordered the water to be divided, according to the proportions ascertained to be owned by the plaintiff and defendants respectively, and appointed three commissioners to make the division in pursuance of the order of the court, and to report at the next term. Two of the commissioners presented a report, in which they say: "We first, by means of a box and gate placed in the end of said ditch, where defendants were wont to take out their twenty inches of water, divided or separated from the main body of the first flow of the water twenty inches thereof, without pressure, in the same manner as it was measured when first sold in 1852, as directed by the court in said order, so arranging the gate in the box as to slide up or down, as the quantity of water in the ditch varies; which said twenty inches of water we turned out to, and set apart for, said defendants, which will flow to them constantly all the year round. The balance or remaining portion of said water of said ditch, described in said commission, we divided at the lower end of said race between the plaintiff and defendants, giving to the said plaintiff two fifths of the water, and to the defendants three fifths thereof. The said division of water was made in the following manner: After we had separated and set off to the defendants twenty inches of the first flow of the water (as it ran in the ditch) we partitioned the balance by means of a division box, placed at the lower end of said ditch, with five equal apertures arranged side by side on the same level, in such manner that the water of the ditch, whether low or high, will flow out through said five openings in equal quan-

tities; three fifths of said balance of water, after flowing through three of said openings, falls into a ditch of the defendants, and flows off to them, it being optional with them to keep it separated into three parts or to mingle with it. The other two fifths of said balance of water flows through two of said apertures and falls into a ditch of the plaintiff, and thus flows to him."

The other commissioner dissented, and made a counter report, in which he maintains that the water is not properly divided; that the defendants do not get their full amount of the first flow by the division made; that it is impracticable to make a just and permanent partition of the waters; and that any such attempted division would prove greatly njurious to the interests of the parties. The court adopted and confirmed the majority report, and made a final decree in accordance therewith, in which it was "ordered and adjudged that said report stand, and the same is the judgment of the court in partition to be of perpetual effect between the plaintiff and said defendants," etc.; to all of which proceedings defendants objected and excepted, and they now appeal from the judgment.

Appellants allege that the court erred in assuming to make a partition of the water in the mode provided by the judgment. It would, to our minds, be utterly impracticable for the court to make a mechanical division of the water running in a ditch owned by tenants in common, and used for mining purposes, in such a manner as to permanently do justice between the parties. The object of a partition of the property itself is to enable each party to obtain the title to, and the use for all future time in severalty, of some definite portion of the property owned in common, and thereby permanently end all disputes and remove all obstructions to its free enjoyment. In the case of two mills upon a stream comparatively constant in its flow, which are permanently located at a permanent dam upon its banks, and to which a right to the use of the water of the stream for propelling them is appurtenant, and where permanent gates and gauges may be fixed, it is possible, perhaps, to arrange a division of the water in such a manner as to approximately do justice between the parties. The chancellor so thought in *Smith* v. *Smith*,

10 Paige, 470. But in the case of water conducted in ditches for mining purposes, the circumstances are entirely different. The use of the water is rarely had for any considerable length of time at the same point. When the claim of a miner is worked out he must remove to another. There is occasion continually to change the point at which he uses the water and at which he takes it from his ditch. Besides, when a given quantity is to be taken out of the first flow of the stream, without pressure, where the amount of water in the ditch is subject to great fluctuation, gates must be arranged so as to increase or diminish the aperture through which the water is discharged, according as the amount of water increases or diminishes, as was actually done in this instance. But the court can not say at what point the gate shall stand to-morrow, or next day, or the next—nor can it take upon itself the appointment of an officer to stand at the gate and gauge it in accordance with the ever-changing current of the stream. An adjustment of the "apparatus" which would make a perfectly fair division to-day, might produce an entirely different result to-morrow. This partition is to be "of perpetual effect," and to be "of perpetual effect" it would be necessary to take the water out at that particular point, through the box placed there by order of the court, by means of which the partition is made, whether the parties can any longer make it available for their mining purposes at that point or not. It is manifest that partitions, made upon this theory, can not, ordinarily at least, be permanent without working great injury to the parties. In the language of appellants' counsel, "The water to be valuable must follow the mines, and be used at those points where the mining claims are situated, which involves the necessity of shifting the ditch line from place to place, and the construction of extensions and lateral ditches, as new occasions require." The ditch and the right to take the water from the creek above in this case, are still held in common, and the expenses of keeping the ditch in repair must still be a common charge. There is no partition, except of the water. It is manifest that the court has assumed a duty that is utterly impracticable for it to perform. The court may determine the rights of the parties, and ascertain and adjudge the amount of interest which each

party holds; but it can not assume to make a mechanical division of a material which, from its nature and the nature of the uses to which it is applied, is incapable of any permanent division that shall do justice between the parties. The only partition that the court can make, which will definitely and permanently end the dispute of the parties and do justice between them, is to order a sale and distribute the proceeds.

In this case the court did not attempt to make a complete partition. It only divided the water between the plaintiff, on one side, and the three defendants, as one party, on the other. The record shows that the three defendants owned the twenty inches jointly, and two of them three fifths of the remainder. The defendants demanded that the twenty inches should also be partitioned among them; but it was not done, and it is obvious that it would be utterly impracticable for the court to adjust such complicated interest by a single mechanical division by means of boxes, gates and gauges, to permanently remain. An attempt to do it would be, not to end, but to encourage and multiply litigation to an unlimited extent.

The necessary facts to enable the court to make a proper distribution of the proceeds, on a sale, do not appear in the findings, and a new trial will be necessary.

Judgment reversed, and a new trial ordered in pursuance of the principles indicated in this opinion.

By the Court, SAWYER, J., on petition for rehearing.

The correctness of our decision is not questioned in the petition for rehearing. A rehearing seems to have been asked on the supposition that the district court was directed to enter a judgment ordering a sale of the property and division of the proceeds. But such is not the order. The order is: "Judgment reversed, and a new trial ordered in pursuance of the principles indicated in this opinion." When the case goes back a new trial will be had. The plaintiff prays for a partition. If a partition is to be had, it can only be made by a sale and a division of the proceeds. Plaintiff now urges that upon the pleadings a partition would not necessarily follow; that other relief may be had which will accomplish the object of the parties. These questions do not arise upon this appeal. Upon a new trial the court will

doubtless afford such relief as it judges the parties may be entitled to upon the pleadings and facts established on the trial. The defendants do not appear to demand affirmative relief; they simply submit to a partition, but insist that they are entitled to a larger share than is accorded to them in the complaint, and that, if a partition is decreed, it should be made according to the interests as claimed in the answer. If the pleadings do not present the questions which the parties desire to litigate and have determined, in view of the fact that a mechanical division of the water can not be had, perhaps the suit might be dismissed, and another commenced upon another theory, or parties might arrange to amend. At all events, when the cause goes back for a new trial, the parties can pursue such course as they may deem their interests to require. We do not see that a different judgment could be entered upon this record.

A rehearing is denied; but to guard against misapprehension, the order for judgment is modified so as to read:

Judgment reversed and new trial ordered.

DALL, Respondent, v. THE CONFIDENCE SILVER MINING Co., Appellant.

(3 Nevada, 531. Supreme Court, 1867.)

[1] **Accounting, as an incident.** When a proceeding for partition of realty is had in a court of equity, the court will not only proceed to divide the land but will, in a proper case, direct an accounting, and do equity in the case by making parties account for rents, etc.

[2] **Partition a matter of right.** As the law deems it against good morals to *compel* joint owners to hold a thing in common, a decree of partition may always be insisted on as an absolute right. It is not necessarily founded upon any misconduct of the co-tenants or part owners, but is in obedience to the call of the parties who have a right to the partition.

Partition first—Sale as an alternative. In a suit for partition a sale of the property should never be decreed except when a partition would result in great prejudice to the respective owners, and under the Nevada statutes if any one of the tenants in common files an affidavit that a sale for cash would be injurious to him, it is the duty of the court to appoint a commissioner to divide the property, and it is error to decree a sale.

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[1] *Bradley* v. *Harkness*, 11 M. R. —; *Hoffman* v. *Ross*, 25 Mich. 175; *Packard* v. *King*, 3 Colo. 211.

[2] *Morrill* v. *Morrill*, 5 N. H. 136.

Practice. A sworn answer setting up the same matter as required by statute in the affidavit, is equivalent to it.

No compensation for incidentally enhancing value. The defendant in a suit between tenants in common for the partition of twenty-five feet of a mining claim, will not be allowed compensation for developments done upon an adjoining claim which have incidentally enhanced the value of the premises of which partition is sought.

Appeal from the District Court of the First Judicial District, Storey County, Hon. RICHARD RISING presiding.

HILLYER & WHITMAN, for appellant.

WOOD & HILLYER, for respondent.

By the Court, LEWIS, J.

This is a proceeding under the statute concerning the partition of real property, the plaintiff seeking by his bill a sale of a mining claim, consisting of twenty-five feet of ground in Gold Hill, owned by himself and the defendant as tenants in common. After the usual allegations in this character of proceeding the bill concludes as follows: "And plaintiff further avers that he is desirous that a partition of said premises should be had, and the interest held by plaintiff and defendant be divided between them according to their respective rights; but plaintiff avers that said premises are so situated that a partition thereof can not be made without great prejudice to the owners, to wit, to plaintiff and defendant, and that for the protection of the rights of the plaintiff and defendant it will be necessary that said premises be sold." The defendant, in its answer, meets this allegation of the complaint in the following manner: "Now comes the defendant and answering unto plaintiff's complaint denies that the premises described in said complaint are so situated that a partition thereof can not be made without great prejudice to the plaintiff and defendant, as by the plaintiff alleged. It further denies that for the protection of their interests it will be necessary that the said premises be sold, but avers that for all purposes of mining with convenience, twelve and one half feet of ground can be worked with as much facility as twenty-five feet; that the de-

fendant is a corporation for mining purposes, and hath issued its certificates of stock for the number of feet in its claim, including its undivided half of the ground described by plaintiff's complaint; that to sell said ground would create confusion in the affairs of the company and seriously depreciate its stock, so that it shows to the court that it would be contrary to equity and good conscience to sell said premises."

Then follows an allegation to the effect that the defendant has expended a large sum of money in developing the mine; that by the money so expended the plaintiff's interest in the mine had been enhanced in value; that by the labor of the defendant the mine has been developed, and that plaintiff, though knowing of such labor and expenditure, interposed no objection thereto. Upon these facts an accounting is prayed for, and it is asked that the plaintiff be decreed to pay his equitable proportion of the expense incurred in such development.

At the trial the plaintiff's witnesses testified in substance that twelve and one half feet of mining ground in Gold Hill could not be mined to advantage, and it did not afford sufficient room for the erection of the necessary buildings; that twenty-five feet (the extent of the entire claim) could be worked more cheaply and advantageously and securely than twelve and one half feet; that a mine consisting of but twelve and one half feet could only be worked through the adjoining claims, and that one working such mine would be entirely dependent upon the owners of the adjoining mines for the means of taking the ores from it. This is substantially all the evidence introduced by the plaintiff.

The substance of the defendant's evidence on this point is that twenty-five feet of mining ground could be worked and developed with no more safety or profit than twelve and one half feet. The only object of this testimony was to show that no controlling necessity existed for ordering a sale of the entire mine. Upon this point, therefore, there is a conflict in the testimony presented by the respective parties. The defendant further offered to prove that it had expended a large sum of money in attempting the development of the mine; that such expenditure had been greatly in excess of the receipts, and that the development so made by the defendant

had greatly enhanced the value of the mine. This testimony was offered for the purpose of obtaining an accounting, but was ruled out by the court below, and an exception taken by the appellant.

The court found as facts established in the case "that the parties to this action, plaintiff and defendant, are seized of and entitled to the mining property and quartz ledge mentioned in the complaint in this action, as tenants in common thereof in fee simple, each owning an equal undivided one half of the same." "That there are no liens nor incumbrances upon the said premises or any part thereof, either by mortgage, judgment or otherwise; that the said property is so situated that a partition thereof can not be made without great prejudice to the plaintiff, one of the owners thereof." Upon these facts a decree was rendered directing the sale of the entire mine in one parcel, at public auction, to the highest bidder.

From this decree and from the order refusing a new trial the defendant appeals to this court. Though partition had its origin in the common law courts it is a subject over which the courts of equity assume almost exclusive jurisdiction, and in disposing of the cases for partition the equities of the respective parties growing out of their ownership of the property as tenants in common or otherwise are taken into consideration, and disposed of upon the broad principles which govern those courts in the administration of justice. As the law deems it against good morals to compel joint owners to hold a thing in common, a decree of partition may always be insisted on as an absolute right. It is not necessarily founded upon any misconduct of the co-tenants or part owners. Hence, in decreeing a partition the rights and equities of all the parties are respected, and the partition decreed so as to do the least possible injury to the several owners; and "courts of equity," says Mr. Story, "may, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty or equality of partition, so as to prevent any injustice or unavoidable inequality." (Eq. Jur., Sec. 654.) Again, speaking of cases where one of the parties has laid out large sums of money in improvements on the estate,

the author says: "Under such circumstances the money so laid out does not in strictness constitute a lien on the estate; yet a court of equity will not grant a partition without first directing an accounting, and compelling the party applying for partition to make due compensation. So where one tenant in common has been in the exclusive reception of the rents and profits on a bill for a partition and account, the latter will be decreed." (Id. Sec. 655.) And in section 656 of the same work it is said: "For in all cases of partition a court of equity does not act merely in a ministerial character, and in obedience to the call of the parties who have a right to the partition, but it founds itself upon its general jurisdiction as a court of equity, and administers its relief *ex æquo et bono* according to its own notions of general justice and equity between the parties." Such are the general and just principles governing courts of equity in the administration of relief in cases of this character in the absence of statutory regulations. When the statute prescribes a course to be pursued, that course must doubtless be followed so far as it goes, but beyond it the general principles which we have stated should control the action of the courts.

In decreeing a sale of the mining ground in this case, the court below seems to have been guided neither by the letter of the statute nor by those general principles which usually govern the courts in the absence of statute. A sale of the property should never be decreed, except when a partition would result in great prejudice to the respective owners. Such has always been the rule, and section 708, adopting it, declares that "in case of partition of a mining claim, any of the tenants in common or joint tenants interested therein may file an affidavit showing to the court that a sale for cash would be injurious to him, her, or them; the court shall upon such showing appoint a commissioner, who shall divide such claim as hereinafter provided for." The remaining sections describe the manner in which the commissioner shall proceed, which if correctly followed will, we presume, usually result in an equitable partition of the property between the respective owners. When no affidavit is made by any of the part owners the court might perhaps decree a sale for cash of the entire mine; but when such affidavit is filed, no course can properly be pursued but

that prescribed by the statute. The defendant in this case filed a sworn answer, in which it is fully shown to the court that a sale for cash would be prejudicial to its interests. That such an answer fully meets the requirements of the statute there can scarcely be a doubt. The only object of the law is to require a showing by the party opposing a sale that it would be prejudicial to him. We are not aware that the law attaches any virtue to an affidavit in the ordinary form, which it does not to a sworn answer. The fact is presented upon the oath of the party wishing to avail himself of it. Whether it be shown by affidavit in the usual form or by an answer properly verified, is of no consequence. The court below should therefore have treated the answer as an affidavit, and pursued the course pointed out by those sections of the statute which have been referred to. This court can not know how the answer was treated by the parties or the court below. It is found in the record before us, and in our judgment it answers all the purposes of an affidavit in the ordinary form.

But it is claimed by counsel that as the statute gives no new r ght, but only furnishes a new remedy, it is not necessary strictly to follow the mode of procedure prescribed by it.

In answer to this position it is only necessary to refer to the language of section 708, already alluded to, which, by a fair construction, prohibits a decree for cash when any one of the part owners files an affidavit showing to the court that such a sale would be injurious to him. When the affidavit is filed, the tenant making it has a right to insist that the partition shall be made as the statute directs. When no objection is made, the court might decree a sale; but as the law regards the rights of all the interested parties alike, if any of them object to such sale and show in the manner pointed out that it would be prejudicial to them, the statute has marked out a course to be pursued which will doubtless, in a majority of cases, result in an equitable division of the prope ty; and as the language of the statute is mandatory, declaring that "the court shall upon such showing appoint a commissioner," etc., no other course can properly be pursued. The court therefore erred in decreeing a sale of the premises.

The appellant also complains that the court below erred in

refusing to allow it to show the amount of money expended by it in developing the mining ground in question and the value of the improvements placed thereon by it.

We are satisfied from the record as it is presented to us, that it is unnecessary to determine the general question as to whether compensation will be allowed for developments made or improvements placed on a mine by one tenant in common, because the record in this case shows that the only developments made or work done by the defendant were upon the adjoining claim, which belongs to the defendant exclusively.

However much the developments on that mine might enhance the value of the premises in question, it was only incidental, and therefore the plaintiff could not be held to be responsible for any money expended in such work or development. Had the work been done upon the twenty-five feet of which a partition is here sought, a different and very difficult question would present itself. Hence, all evidence tending to prove the extent of the developments on the defendant's adjoining claim, or the amount of money expended in making such developments, was properly ruled out.

Unless, therefore, there be developments made or improvements put upon the twenty-five feet in question, the court below will proceed to divide the mine in the manner pointed out by statute.

STRETTELL v. BALLOU ET AL.

(3 McCrary, 46. U. S. Circuit Court, District of Colorado, 1881.)

Equity jurisdiction of Federal courts not controlled by State statutes. The equity jurisdiction of the Circuit Courts of the United States is derived from and defined by the constitution and laws of the United States, is the same in all the States, and is not affected or varied by the statutes of the States regulating and defining the chancery powers and jurisdiction of the State courts.

Partition of possessory mining claim. The holder of a mere possessory interest in land, not having title thereto, can not maintain a bill for partition in the Circuit Courts of the United States. Such a bill

must be filed by one having title to a portion of the premises sought to be partitioned. If a statute of the State authorizes such bill, it must be filed in the State courts.

This is a bill in equity, in which the complainant prays partition of certain placer mining property in which the complainant has, as he alleges, an undivided interest. It appears from the allegations of the bill and the proof, that the title to the property in controversy is in the United States, the parties to this suit having jointly a possessory claim or interest with the right to take ore therefrom, but no other title. The defense is that this court has no jurisdiction in equity, because the complainant has no title to the land.

M. B. CARPENTER, for complainant.

DIXON & REED, for respondents.

McCRARY, Circuit Judge.

It has long been settled that the jurisdiction of the Circuit Courts of the United States in equity is derived from and defined by the constitution and laws of the United States; that it is the same in all the States, and is not to be affected or varied by the various statutes of the States, whereby the chancery powers and jurisdiction of State courts may be defined and regulated. This court can not, therefore, look to any State legislation as the source of its jurisdiction in equity. In *Boyle* v. *Zacharie*, 6 Peters, 658, Chief Justice Marshall, speaking for the Supreme Court, thus stated the rule: "And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the State practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law, subject, of course, to the provisions of the acts of Congress, and to such alterations and rules as, in the exercise of the powers delegated in those acts, the courts of the United States may from time to time prescribe." And see to the same effect, *Robinson* v. *Campbell*, 3 Wheat. 212; *U. S.* v. *Howland*, 4 Wheat. 115; *Neves* v. *Acott*, 13 How. 271; *Noonan* v. *Lee*, 2 Black, 499; *Johnston* v. *Roe*, 1 McCrary, 162. It

follows from these authorities that unless the jurisdiction of this court can be derived from the constitution and laws of the United States alone, it does not exist.

Sec. 913 of the Revised Statues of the United States declares that the modes of proceeding in equity causes shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law; and this language refers to the principles, rules and usages by which the High Court of Chancery of England was governed at the time the Judiciary Act was passed.

It is very clear, that according to the general principles of equity jurisprudence as administered in England at the time of the passage of the Judiciary Act, and as administered by courts of chancery in this country, except where a different rule is adopted by statute, the holder of a mere possessory interest in land, and not having title thereto, can not maintain a bill for partition. Such a bill must be filed by one having title to a portion of the premises sought to be partitioned: *Horncastle* v. *Charlesworth*, 11 Simons Ch. 314; *Williams* v. *Wiggand*, 53 Ill. 233; *Ross* v. *Cobb*, 48 Ill. 111.

It is not claimed that there is any act of Congress conferring upon this court jurisdiction in equity of a bill for partition brought by the owner of an undivided interest in a mining claim where the legal title to the real estate remains in the United States. It follows that this bill must be dismissed for want of jurisdiction. If the statutes of the State of Colorado, relied upon by counsel for complainant, confer jurisdiction upon the courts of the State in a case of this character, the complainant must resort to those courts.

1. An agreement between tenants in common of certain ore banks construed so as to exempt them from partition: *Coleman* v. *Grubb*, 23 Pa. St. 393; *Blewett* v. *Coleman*, 11 M. R. 160.

2. No partition of partnership property, without a dissolution of the partnership. *Nisbet* v. *Nash*, 11 M. R. 531.

3. The only practical partition of mines, as a rule, is by sale: *Lenfers* v. *Henke*, 5 M. R. 68. The same as to ditches: *Lorenz* v. *Jacobs*, 59 Cal. 262.

CRAWSHAY V. MAULE ET AL.

MAULE ET AL. V. CRAWSHAY.

(1 Swanston's Ch. 495. High Court of Chancery, 1818. Before Lord Chancellor Eldon.)

General rule as to dissolution. When no term is expressly limited for its duration and there is nothing in the contract to fix it the partnership may be terminated at a moment's notice by either party.

Death terminates a partnership.

[1] **The purchase of a leasehold** interest as part of a stock in trade is not evidence of an agreement of partnership commensurate with the duration of the lease.

[2] **Trading concern—Mines and iron works** operated in connection therewith are not a mere interest in land but a partnership in trade.

Construction of devise of mines and iron works.

[3] **Manager.** The power of the court to appoint a manager of works and mines as a trading concern, pending final decree, stated.

Upon final dissolution of a trading partnership the court will order a sale on motion.

By articles of agreement dated the 31st of July, 1794, between Antony Bacon and Richard Crawshay, Bacon agreed to assign to Crawshay all his interest in certain lands and mines of coal and iron ore, situated at Cyfarthfa in the county of Glamorgan, (of which he, Wm. Crawshay, was then in possession, under three leases for terms of 99 years each, commencing respectively in the years 1763, 1765 and 1768,) subject, after the 29th of September, 1815, to an annual rent of 5,000 pounds, and a payment of 15 shillings a ton on all pig iron annually made on the premises beyond 6,400 tons. Richard Crawshay accordingly took possession of the premises, and carried on iron works there, and in 1801, intending an

[1] *Phillips* v. *Reeder*, 11 M. R. 419.

[2] *Wren* v. *Kirton*, 2 M. R. 408; *Williams* v. *Attenborough*, Id. 410; *Dudley* v. *Warde*, 6 M. R. 34.

[3] *Wilmington Co.* v. *Allen*, 9 M. R. 106; *Roberts* v. *Eberhardt*, 11 M. R. 301.

extension of the works and the erection of new furnaces, it was agreed between him and Bacon that the payment of 15 shillings a ton beyond 6,400 tons should cease at 10,700 tons. Disputes having arisen on the subject of that agreement in 1808, Richard Crawshay filed a bill to compel specific performance. The decree pronounced in March, 1810, directed Bacon to execute to Richard Crawshay an underlease of the premises, for all the time which he, or the trustees under his marriage settlement, had therein, except the last day, subject to the yearly payments stipulated.

Richard Crawshay being seized and possessed of a considerable real and personal estate, including the iron works at Cyfarthfa, and the buildings and machinery thereon, and a leasehold wharf at Cardiff, used for shipping iron, by his will dated the 26th of September, 1809, after giving among other legacies £100,000 to his son, William Crawshay, gave to Joseph Bailey £25,000 "to be transferred from my account on the ledger to his, intended as a capital, for him to become a partner, with my executor, of one fourth share in the trade of all those works, so long as the lease endures, with the principal and profits therefrom to be his own forever." He then gave to Benjamin Hall, Esq., and his wife, of Abercarne, and to their heirs forever, all the residue of his estate, real and personal, and appointed Mr. Hall sole executor. By a codicil, dated the 4th of May, 1810, the testator gave to his son, William Crawshay, "three eighth shares of my concerns at this iron work, and of the premises at Cardiff, so the partnership will stand at my demise; William Crawshay three eighths, Benjamin Hall three eighths, Joseph Bailey two eighths." The testator died on the 27th of June, 1810; Mr. Hall proved his will, and William Crawshay, Hall and Bailey took possession of the iron works, and carried them on as copartners in the shares bequeathed to them, under the firm of Crawshay, Hall & Bailey, but without any articles of copartnership. In October, 1812, William Crawshay purchased the share of Bailey for £30,000, and from that time the works were conducted by William Crawshay and Hall, till the death of the latter under the firm of Crawshay and Hall. No written articles of copartnership were ever executed or prepared between them; but they verbally agreed that the future capital of the

concern should be £160,000, which consisted of an imaginary or estimated value of the whole of the partnership property; (£100,000 standing to the credit of William Crawshay, in respect to his five eighth parts, and £60,000 to the credit of Mr. Hall, in respect to his three eighth parts); and that the books should be balanced on the 31st of March in each year, and the annual profits drawn out by William Crawshay and Hall, in proportion to their shares.

No underlease having been executed in the life of Crawshay, by indenture of the 21st of May, 1814, Bacon and his trustees, in obedience to the decree of 1810, assigned to Hall, his executors, etc., all the premises, for the residue of the respective terms, except the last day of each, subject to the annual rent of £5,000 and the payment of 15*s.* a ton on all pig iron made yearly on the premises above 6,400 tons, and not exceeding 10,700 tons; and by a deed dated the 1st of June, 1814, and indorsed on the assignment, Hall declared that he would stand possessed of the premises, as to three eighth parts in trust for himself, and as to five eighth parts in trust for William Crawshay; and Hall and William Crawshay entered into covenants for payment of their respective proportions of rent and for mutual indemnity.

By indenture dated the 23d of May, 1814, Bacon, in consideration of £32,500, paid three eighths by Hall, and five eighths by William Crawshay, assigned to Joseph Kaye, his executors, etc., in trust for Hall and Crawshay, in the proportion of three eighths to the former and five eighths to the latter, the rent of 15*s.* per ton on iron, then due or to become due. By another indenture of the same date, Bacon, in consideration of £62,500, assigned to Kaye in trust for William Crawshay his reversionary interest in the premises, and the annual rent of £5,000.

On the 1st of June, 1814, Bailey, in execution of the agreement of October, 1812, assigned to William Crawshay his share in the partnership property. On the 31st of July, 1817, Mr. Hall died, leaving four sons (the eldest of the age of fifteen years) and a daughter. By his will, dated the 8th of the same month, he devised to George Maule, John Llewellin and Joseph Kaye all his freehold, copyhold and leasehold estates, (except trust and mortgage estates, and the estates in which he

was interested as a partner with William Crawshay, at Cyfarthfa,) in trust, subject to the payment of debts and legacies in aid of his personal estate, for the benefit of his children. He then declared, that if he should have one or more son or sons living at his decease, or born in due time after, but no such son should then have attained the age of twenty-one years, it should be lawful for his trustees, and the survivor and survivors of them, and the executors, etc., of such survivor, to carry on the iron works and other mercantile or trading concerns in which he should be concerned at his decease, if they should judge it for the benefit of the persons interested in his property under his will; and that if they should carry them on, then during such time as his having such a son should be in suspense, it should be lawful for them to cause or permit any part of the stock in trade or effects which should be employed in or belong to the said works or concerns at his decease, to be employed in carrying on the same; and he exempted the stock in trade and effects so to be employed from the payment of his debts, to the extent and manner thereinafter mentioned. The testator also declared, that if his son, who first or alone should attain the age of twenty-one years, should be desirous to have the iron works and concerns or any of them continued, and should signify such desire to his trustees by any writing under his hand, the amount of the stock and effects then employed therein should be valued, and his said son should pay (or secure in manner therein mentioned) to the trustees the money at which such stock and effects should be estimated. The testator then directed the application to be made, by his trustees, of the profits of the iron works during the suspense of his having a son who should attain twenty-one years, and of the amount of the valuation to be paid or secured by his son as before mentioned; and declared that if his iron works and other concerns should be so carried on, and his son, who first or alone should attain the age of twenty-one years, should decline to carry on the same, or to give such security for the stock and effects employed therein, or if, while it should be in suspense whether he should have any such son, his trustees should deem it advisable to discontinue the said iron works and concerns, in either such cases the iron works and concerns should be discontinued, and the stock and effects employed in the same should be sold and

disposed of in such manner as his trustees should judge prudent and reasonable, and the money arising from the sale, and the gains and profits previously arising from the iron works and concerns, should be disposed of in the manner in which he had directed the gains and profits, and the money to be paid or secured by his son, in the event before mentioned, to be paid or applied, or as near thereto as circumstances would admit. The testator then appointed Maule, Llewellin and Kaye, executors of his will and guardians and managers of the estate of his children during their minorities; and he also appointed his executors and his wife guardians of the persons of his children, and he authorized his trustees to employ any persons, in the management of the iron works and concerns, at such salary and to repose in them such trust or authority in conducting the trade and in the management and disposal of the estate employed, or to be employed, and in the receipt of any debts to be contracted therein, as his trustees should in their discretion think fit.

On the 12th of August, 1817, William Crawshay sent a written notice to the executors of Hall that he considered the partnership absolutely dissolved by Hall's death, and would not consent to carry on the works in conjunction with his representatives.

The bill in the first cause, filed by William Crawshay against the executors of Mr. Hall, prayed a declaration that the partnership between the plaintiff and Hall, in the iron works, and all the trade and business thereof, became absolutely dissolved, or determined, by the death of Mr. Hall, or from that period; an account of the partnership dealings from the foot of the last settlement thereof, previous to his death and payment of the balance (after satisfaction of the partnership debts) between the plaintiff, and the executors of Mr. Hall, according to their respective interests; a sale of all the partnership effects, and a division of the proceeds. The defendants, the executors of Hall, admitted that no written articles were ever entered into between William Crawshay and Hall, any such articles, as they believed, being considered unnecessary, inasmuch as the proportions to which the parties were entitled in the leasehold premises and the leases sufficiently ascertained their rights and interests as long as the leases endured. They

denied that by the death of Hall his interest in the premises and iron works determined or was in any respect affected, submitting that they were entitled to the premises and iron works as tenants in common with William Crawshay for the residue of the terms of years for which they were holden, and to carry on iron works for the benefit of the family of Hall, in the same manner as he carried on the same with William Crawshay, and, according to the directions of his will, until one of his sons should attain the age of twenty-one years. They stated that the iron works were absolutely necessary to the beneficial enjoyment of the leasehold premises; and they insisted that it appeared from his will and codicil to be the intention of Richard Crawshay that his legatees should, for themselves and their representatives and families respectively, have an interest in the leasehold premises and iron works, commensurate with the terms for which they were holden; that the joint interest which William Crawshay and Hall had therein was not an interest in an ordinary trading partnership, but an interest given by Richard Crawshay to them for the benefit of themselves and their respective families, commensurate with the terms of years for which the leasehold premises were holden; and that therefore no sale of the property ought to be directed by the court in opposition to the bequest of Richard Crawshay, and to the will of Hall, whose family would in that event be deprived of the benefits intended and contemplated by him to be derived from the leasehold premises and iron works. The bill in the second cause, filed by the executors and the children of Mr. Hall against William Crawshay, prayed a declaration that the executors were entitled to the leasehold premises and iron works, for three eighth parts thereof, as tenants in common with William Crawshay, (who was entitled to the other five eighth parts,) until one of the sons of Hall should attain the age of twenty-one years, and to carry on the iron works with William Crawshay for the benefit of the family of Hall in the same manner as Hall carried on the same, and, according to the directions of his will, until one of his sons should attain the age of twenty-one years; and that then such son, if he chose, would be entitled to the said leasehold premises and iron works, for three eighth parts thereof, as tenant in common with William Crawshay, for the

remainder of the said terms of years, and to carry on the iron works with William Crawshay accordingly. The bill also prayed the consequential accounts and directions. June 9th. On this day a motion was made, in behalf of William Crawshay, that it might be referred to the master to consider and approve a proper plan for the sale and disposal of the whole of the copartnership iron works, property, estate and effects, including the good will of the joint trade, and that the master might proceed to a sale thereof immediately.

SIR SAMUEL ROMILLY, Mr. BELL, Mr. HORNE, and Mr. RIGBY, in support of the motion.

SIR ARTHUR PIGGOTT, Mr. HART and Mr. WINTHROP, against the motion.

THE LORD CHANCELLOR (ELDON).

An important consideration is, whether this business is such as would subject the parties to become bankrupts. The distinction is obvious, and for this purpose, material, between a partnership in trade, and a joint interest in land. As between tenants in common, the court does not dissolve the tenancy, but leaves each to sell his share; while in cases of partnership in trade, unless under particular circumstances of the trade, the rule is different.

The object of this motion is a sale of the partnership property, and in whatever terms expressed, the court, if it directs a sale, will so direct it that the property may be sold in the manner most beneficial for all parties interested. Where a suit is instituted for the dissolution of a partnership, and where it is clear on the bill and answer that all, or some of the parties, have a right to a dissolution, it is not contrary to the course of practice to direct a sale on motion. The two modes of proceeding for obtaining an immediate order for a sale, either to set down the cause for hearing on bill and answer, or to apply by motion, are the same in effect, though different in form. The reason of that practice is that if one partner has a right to consider the partnership as at an end, it may continue for the purpose of winding up the affairs, but being by death, or notice, or any other mode of determination actually ended, no person in possession of the property can make

any use of it inconsistent with that purpose. If any person, therefore, conducts it otherwise, the court will appoint a manager to wind up the concern (*Harding* v. *Glover*, 18 Ves. 281,) and will direct inquiries in what manner it can be wound up most beneficially to those interested. The object of this motion, therefore, might be obtained notwithstanding the objection of form, and the difficulty with regard to parties might also be remedied by allowing the case to stand over for the bill to be amended ; and the question is to be considered on the part of Mr. Crawshay as if the infant children of Mr. Hall had applied for a declaration that the partnership is not dissolved.

The general rules of partnership are well settled. Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party.

By that notice the partnership is dissolved to this extent, that the court will compel the parties to act as partners, in a partnership existing only for the purpose of winding up the affairs. So death terminates a partnership (*Crawford* v. *Hamilton*, 3 Madd. 251) and notice is no more than notice of the fact that death has terminated it: *Vulliamy* v. *Noble*, 3 Mer. 514. Without doubt, in the absence of express, there may be an implied contract as to the duration of a partnership, but I must contradict all authority if I say that whenever there is a partnership the purchase of a leasehold interest, of onger or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument, the court, holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that if the partners purchase a fee simple, there shall be a partnership forever. It has been repeatedly decided that interests in lands purchased for the purpose of carrying on trade are no more than stock in trade. I remember a case in the House of Lords about three years ago, *the case of the Carron Company*, in which the question was much discussed whether, when partners purchase freehold estate for the purpose of trade, on dissolution that estate must not be considered as personalty, with regard to the representatives of a deceased partner: Post, p. 234. The doctrine that death

or notice ends a partnership has been called unreasonable. It is not necessary to examine that opinion, but much remains to be considered before it can be approved. If men will enter into a partnership, as into a marriage, for better and worse, they must abide by it; but if they enter into it without saying how long it shall endure, they are understood to take that course in the expectation that circumstances may arise in which a dissolution will be the only means of saving them from ruin; and considering what persons death might introduce into the partnership, unless it works a dissolution, there is strong reason for saying that should be its effect. Is the surviving partner to receive into the partnership at all hazards the executor or administrator of the deceased, his next of kin, or possibly a creditor taking administration, or whoever claims by representation or assignment from his representative?

If Mr. Crawshay, the testator and owner of this property, had thought proper, by his will, to declare that his legatees should continue the partnership as long as the longest of the leases should endure, no person, I agree, claiming under that will, could enjoy the benefits conferred by it without submitting to the inconveniences which it imposed; but I find nothing to that effect in his will. It might have been plausibly, though I think not effectually, contended, that Bailey and Hall were bound to continue partners as long as they lived; but the words can not be represented as imperative on any other person. The difficulty on the part of those who insist that the partnership is to continue as long as the leases is this, that they can not insist that it is to continue between the original partners and their representatives, for they have admitted and must admit that each partner might assign his interest and assign it to any number of individuals, in any number of shares, so that in truth the partnership, within two years after its formation, might not contain either an original partner or a representative of any one of the original partners, but might consist entirely of a multitude of assignees.

In another view of this question it becomes important accurately to know the nature of the business. It seems difficult to establish that this is an interest in land distinct from a partnership in trade; a mere interest in land, in which a partition could take place; for when persons, having purchased such an interest, manufacture and bring to market the produce

of the land as one common fund, to be sold for their common benefit, it may be contended that they have entered into an agreement which gives to that interest the nature and subjects it to the doctrines of a partnership in trade. Such is my present view, but both on the merits and on the objections of form the case deserves further consideration.

June 27th. THE LORD CHANCELLOR.

It may be assumed, though the observation is not material to the purposes of this application, that the desire of Mr. Crawshay, the testator, was to keep the concern together. He gives the sum of £25,000 to Mr. Bailey as a capital for him to become a partner with his executor, Mr. Hall; the rest of his interest in the trade, if he had not made a codicil, would have passed by the will to Hall and his wife. The effect of the will and codicil combined is this: by the former the testator being possessed of the entire concern, bequeathed two eighths to Bailey; the rest, including the three eighths given by the codicil to William Crawshay, would have devolved, under the residuary clause, to Hall and his wife. The codicil, continuing the gift of two eighths to Bailey, disposes of three eighths to William Crawshay, and of the remaining three eighths to Hall in exclusion, as I understand, of his wife. Such being the state of the concern at the death of the testator, it appears that Bailey sold his share to William Crawshay, and it has not been disputed, in the course of the discussion, that every one of the legatees was at liberty to sell his interest. The consequence is that the individuals forming the partnership may be changed as often as the partners think proper. The question on the pleadings is, whether, supposing this the hearing of the cause, the court could order the property to be sold; and whether the nature of the concern and of the interest of the several parties in it is not such that each being at liberty to sell his own share, they yet can not, more particularly by interlocutory application, call on the court for a sale of the whole. Mr. Crawshay, having bought the interest of Mr. Bailey, carried on the business jointly with Mr. Hall, till the death of the latter. His will seems to me to devolve on his executors the discretion of continuing or discontinuing this concern, as they should think most for the benefit of his family; and he considers himself at liberty (for the will states as much) to introduce three executors as partners with Mr.

Crawshay, and various branches of his family as *cestuis que trust* of those executors, as they must be if the partnership is continued. It is impossible to contend that Mr. Hall may thus impose on Mr. Crawshay the necessity of continuing in partnership with his three executors and their *cestuis que trust*, without admitting that on the same principle he might have imposed the obligation of receiving as partner any person who might now sustain, or hereafter acquire, the character of executor or administrator to any of the trustees, or of their *cestuis que trust*, and that Mr. Crawshay might have exercised a similar power. If this case is to be considered subject to the principles which govern partnerships in general, I can not say that such was the situation of either party.

On the death of Mr. Hall, there being no articles of partnership or agreement for its continuance, without any notice, and for every purpose except that of winding up the concern, the partnership would cease, unless the surviving partner and the representatives of the deceased entered into some agreement for its continuance; and in the absence of articles or stipulation to the contrary, Crawshay in the life of Hall or Hall in the life of Crawshay might, on the common principles of the contract, by notice, have terminated the partnership. It is contended that the late Mr. Crawshay, having formed this business, must have had an intention to keep it together as one concern, though he distributed different interests in it among different members of his family; had he so said, without doubt those who took his bounty must have taken it on the terms which he imposed; but there is no such expression in his will or codicil, nor is the effect of those instruments more than to give an interest in aliquot shares and proportions in this concern. He has said, indeed, that Bailey should have an interest to the amount of £25,000 and should be partner with his executor; but neither the terms nor the intent of the will impose on Bailey, or on his executor, an obligation to carry on the partnership, except as between themselves; and if Bailey thought proper to sell to Crawshay his interest, a question might have arisen, as long as the executor was living, whether Crawshay, purchasing the interest of Bailey, did not purchase subject to the obligation which, it is said, this will imposes on Bailey; but it seems to me impossible to contend that when the executor was dead either Crawshay or

Bailey were bound to carry on the trade with the executors of that executor; a proposition which can not be maintained without asserting that they were bound to carry on the trade with the successive executors of that executor to the expiration of the leases.

It has also been insisted that the purchase of leases must be considered as evidence of a contract for the continuance of the concern. Unquestionably partners may so purchase leasehold interests as to imply an agreement to continue the partnership as long as the leases endure; but it is equally certain that there is no general rule that partners purchasing a leasehold interest must be understood to have entered into a contract of partnership commensurate with the duration of the leases. For ordinary purposes a lease is no more than stock in trade, and as part of the stock may be sold; nor would it be material that the estate purchased by a partnership was freehold, if intended only as an article of stock; though a question might in that case arise on the death of a partner whether it would pass as real estate, or as stock, personal estate in enjoyment, though freehold in nature and quality. It is impossible, therefore, in my opinion, to hold that there being many leases, some long, some of short duration, and others intermediate, the partnership is to subsist during the term of the leases, or of the longest lease. By the will of Mr. Hall, the question whether his executors and trustees should continue in partnership is left to their discretion; clear evidence of his opinion that his interest might be separated from Crawshay's; if so, Crawshay's might be separated from his; and upon that construction of the will of the late Mr. Crawshay, the argument is, that he meant the whole concern to be kept together, but cared not who were to be the partners; an intention not to be imputed to him unless unequivocally expressed in the words of his will.

The question then resolves itself into this: what is the nature of this partnership property? The general doctrine with respect to a trading partnership is, that where there is no agreement for its continuance any one of the partners may terminate it, and admitting the serious inconveniences which sometimes ensue, it becomes us to recollect the formidable evils which would attend the opposite doctrine; nor is it clear that a better rule could be suggested. But, whatever is its

policy, the principle of law being established, it is incumbent on those who engage in partnership to protect themselves by contract against its inconveniences; if they omit that precaution, courts of justice have no right to redeem them from the penalties of their imprudence. With respect to mere joint interests in land, I apprehend the rule to be different. The parties then becoming tenants in common, each can not call on his companions to concur in a sale, but must sell his own interest. It is said that this is the only case of tenancy in common of a mine; if so, I think that the doctrine with respect to land would apply, and not the doctrine with respect to trading partnerships; but a very difficult question may arise whether, if the parties, being originally tenants in common of a mine, agree to become jointly interested in the manufacture of its produce for the purpose of sale, they continue mere tenants in common of the mine; still more, if not only carrying the produce of their own mine to market, they become purchasers of other property of a like nature to be manufactured with their own. On such a case in bankruptcy it might be a question whether they were purchasers for the mere purpose of better bringing to market the produce of their own mine, or for the purpose also of bringing a distinct subject to market, as traders. On the evidence before me the case is left somewhat doubtful, though I think that the language of Mr. Hall's will, and of all the instruments, describes this as a trading concern; but under the circumstances it will not be wrong to have the nature of the business explained by affidavit. If this is a trading partnership, the common principles must be applied.

Then comes the question: Can the court, in such a case, direct a sale by interlocutory order on motion? I have considered that question much and I think that the court not only can, but in many instances does, order a sale on motion, in the instance of a trading partnership actually dissolved. Consider the inconveniences of a contrary proceeding. By the hypothesis, the court has before it the case of a trading partnership clearly dissolved, and nothing remains, therefore, but to wind up the concern; we must then weigh the consequences of permitting the business of a partnership, actually dissolved, to proceed until a decree for a sale; a decree which, in those circumstances, must necessarily be pronounced.

An universal rule that the trade, whether beneficial or not, should be carried on till the decree, would render the jurisdiction of the court, in many cases, extremely mischievous; and on general principles, therefore, it is the practice, in the instance of a trading partnership clearly dissolved, at once to put an end to the trade, where that measure is required by the evident interest of the parties.

I shall reserve my final decision till I have seen the affidavit; and it may be worth consideration, whether you will not in the mean time bring before the court the posthumous child of Mr. Hall.

The affidavit of Mr. Crawshay, in explanation of the nature of the business, was to the following effect: "That the iron works at Cyfarthfa had, from the period of their first establishment by his father, been conducted as a trading concern; that the produce of the mines consisted of iron stone, coal and limestone, and that, at the works, large quantities of iron, of various specified descriptions, had been and were manufactured, sometimes from the materials obtained from the leasehold premises in question, and sometimes from pig iron and finers' metal, purchased in London, Plymouth and Bristol; that from the establishment of the works, the proprietors had been in the habit of making very considerable purchases of iron ore from Lancashire, pig iron and finers' metal, and of old wrought iron, naval and ordnance stores, for the purpose of manufacturing the same at the works into various sorts of iron, and re-selling them in that manufactured state; that such purchases (to a large amount), manufacture and re-sale, had been made by the successive firms of Crawshay, Hall & Bailey, and Crawshay & Hall, during those respective partnerships; that the whole of such purchases were made with a view to profit, by manufacturing the same at the works into bar and other iron for re-sale, and not merely for mixing the same with the iron, the produce of the works, for the purpose of improving the iron of the works, or bringing the same better to market; and that from the first establishment of the works the iron stone, coal and limestone, produced from the mines on the works, had never been sold in their natural or raw state, except a small quantity of coal for the accommodation of the laborers.

THE LORD CHANCELLOR.

This application, whether granted or refused, is one of the most important with which I have lately had to deal. The motion is made in two causes, to neither of which is the widow of Mr. Hall a party. The first bill prays a declaration that the partnership is dissolved; the object of the second is to compel its continuance, omitting to advert to a fact, which in any view of the case seems clear, that Crawshay could not be constrained to remain a partner, but had the same right to dispose of his interest, which was exercised by Mr. Hall over his own. I am perfectly satisfied that the relief sought by that bill can not be given; that is, that the executors of Mr. Hall can not bind Crawshay to them; whether he can compel dissolution is quite another question.

Mr. Hall, having by his will disposed of his own share, and attempted to introduce new partners, there is obviously no equity to constrain these parties to continue in partnership, unless it arises from express or implied contract, or from directions in the will under which they all claim. In that will I find no such direction. It is calculated only to render Bailey a partner in the trade, but imposes no conditions on Crawshay. On that point, however, it may be sufficient to say, that had any such conditions been imposed, yet when the interests of Bailey and Crawshay became united in one person, and the executor was dead, having made such a will as appears in these pleadings, it would be impossible to maintain that an obligation existed among the parties to continue in partnership during the remainder of the leases.

I am also of opinion, that if this is to be considered as a partnership in trade the utmost that can be made from the purchase of leases, of longer or shorter duration, is to propose that, as a circumstance of evidence, from which may be inferred an implied contract that the partnership should last as long as those leases; but I find nothing here to authorize the conclusion that such was the intention. The purchase of a lease by a partnership is no more than the purchase of an article of stock, which, when the partnership is dissolved, must be sold. I lay aside the affidavit as to the nature of the undertaking, because there is sufficient in the wills of Crawshay and of Hall, to call on the plaintiffs in the second case,

to show that this was not a trading partnership, if they meant to insist on that proposition. At present, I think that this was a trade.

The next question is, what is the consequence of Mrs. Hall not being a party? It is said that the effect of Crawshay's codicil is not such as to deprive Mrs. Hall of her interest under the will. That argument, if correct, might raise a question somewhat difficult; for considering the nature of the property, including freehold, leasehold and personal chattels, and the power of Mr. Hall, as her husband, over her interest in many parts of that property, by reducing them into possession, unless we hold that the codicil deprived her of all the benefit which the residuary clause in the will conferred, it would not be easy to know what is become of her interest. Mr. Hall has taken on himself by his will to dispose of this property, and has given to his wife a provision which would put her to election if she retains any interest in it; and should she elect to take against the will, it requires consideration that she is not a party. The infant also is not before the court; and some difficulty may arise from acting in their absence. On the other hand, it is impossible to call on Crawshay to continue a partner with the executors of Hall, and to say that, whether they are considered as having the legal estate only, or as trustees for the family of Hall, Crawshay is obliged to unite himself with them as a trustee carrying on the trade for the benefit of their *cestuis que trust*; or that he has not at this moment the same right which Hall by his will supposed his executors would have at his death, and his eldest son at twenty-one. That brings it again to the question whether this is a partnership in trade, or a tenancy in common in land; and, if a partnership in trade, whether the ordinary rule of the court, is, on dissolution by the death of a partner, to wait till a decree before disposing of the partnership property, if the concern is of such a nature that it can not be wound up at once. I consider it clear that the general rule is not to wait for a decree; but, at least, if the parties differ as to the mode of carrying on the trade, the court will without reference to the objection for want of parties, appoint a manager. Whether they will give notice of a motion for that purpose, which they shall be at liberty to do,

or call on the court for its opinion, and a reference to the master to state the best mode of winding up the concern, is what the parties will determine. Mr. Crawshay says, what I think is not unreasonable, that he will not carry on the trade five eighths for himself, and three eighths for the benefit of others. I desire to be understood as not deciding against ordering a sale, if Mrs. Hall and the infant were before the court. If Mr. Crawshay will not carry on the trade, it is for the benefit of all parties interested, absent as well as present, that a manager should be appointed; and it is clear that the court possesses the power of making the order on motion, without waiting for a decree.

July 31st. THE LORD CHANCELLOR.

The first question that remains to be considered is, whether Mrs. Hall has any interest in this fund. How does that stand in the opinion of other persons? First, Mr. Hall disposed of the whole interest by his will, and his executors have filed a bill on the supposition that she had no interest; next, if the codicil had not the effect which I imagine, on the will, the nature of the property renders it extremely improbable that Mrs. Hall should retain any interest; lastly, I think the codicil a revocation of the will so far as concerns the trade. The question follows, is it clear that the partnership was dissolved by the death of Hall, or am I to say that his executors, or any of them, are partners at this day in this concern? After repeated consideration, I entertain no doubt, either that if this is to be regarded as a trading concern, the partnership was ended by his death, or that it was a trading concern; the consequence is that, being a trading concern, and the partnership being terminated by Hall's death, Crawshay would be justified in dealing with the property since that event as a person who is to wind up the concern. That introduces the question whether I am to place a manager on the estate, or to leave Crawshay to deal with the property as surviving partner. In that character he is at liberty to deal with it for the purpose of winding up the concern; it is true that other parties are at liberty to deal with it in the same way; and in the event of differences between them, the court can only appoint a manager, to act under its direction. If application was made for a manager, it would be the duty of the court, with regard to the in-

fants, to consider whether that appointment is for their benefit, or whether there should be a reference to inquire into the expediency of appointing a manager to wind up the business, or ordering a sale. The state of the market varies so much that a sale, which might be beneficial at one moment and prejudicial at another, can not be ordered without inquiry. I think that I shall not do wrong in directing a reference to the master of the vacation, to inquire whether it is for the advantage of all parties that this property should be sold, and, if so, on what terms—without prejudice to any question.

"His lordship doth order that it be referred to Mr. Courtenay, the master of the vacation, to inquire and state to the court whether it will be for the benefit of all parties concerned in the works that the same should be sold, and in what manner—as going works, or that they should be carried on for the purpose merely of winding up the concern; and for the purpose of making such inquiries the parties are to be examined upon interrogatories, if the master should so think fit, and to produce all books, papers and writings relating to the said works, the production of which the said master may think it proper to require; and it is ordered that the said master do proceed *de die in diem.*"

Dec. 24, 1818. By his report, dated 11th December, 1818, the master, after stating that it was admitted that it would be highly injurious to all parties interested to stop the works, or to carry them on merely for the purpose of winding up the concern, or to put them up to sale otherwise than as going works, and that William Crawshay had offered to purchase the whole of Mr. Hall's share for £90,000, certified that it would be for the benefit of the infants, and of all other parties concerned in the works, that the whole of the shares and interests in the said leasehold and other estates, etc., vested in the executors of Mr. Hall, should be sold to Mr. Crawshay at that price. By an order of the vice-chancellor, on the petition of Mr. Crawshay, the report was confirmed, and it was "ordered that the defendants, G. Maule, J. Llewellin and J. Kaye, as executors of the said B. Hall, Esq., the testator in the pleadings named, be at liberty to sell and dispose of, to the petitioner, by private contract, at the sum of £90,000, ascertained and

apportioned as in the said report specified, all the estate, shares, right and interest of them, the said defendants, as such executors as aforesaid, of and in the said iron works, and the said late copartnership of Crawshay and Hall, and in the leases, farms, lands and buildings, wharf, machinery, etc."

VICE v. FLEMING.

(1 Younge & J. 227. Court of Exchequer, 1827.)

[1] **Continuing liability of partner after conditional notice.** The defendant, a part owner in a mine, told the plaintiff, who had supplied the mine on the credit of the firm, that he had sold his share to A and B, who for the future would be his paymasters, and that he, the defendant, would be no longer responsible. He had not in fact sold, but had made an executory contract for sale, which was not consummated. Plaintiff kept on furnishing goods to the mine. *Held*, that a partner may by absolute notice save his liability although he still continues a partner; but that this was not an absolute notice in terms, and its effect should have been left to the jury.

Assumpsit for goods sold and delivered; with the usual money counts.

Plea, general issue. At the trial before GASELEE, J., at the Cornwall assizes, it appeared from the evidence of the plaintiff, that the defendant was part owner, and managing director of the St. Agnes consolidated mine, in the month of February, 1824, and that his name appeared in the cash book, in which the names of the adventurers were regularly entered after the account of each month's expenditure, during the time within which the goods, for which the action was brought, were supplied The action was for goods furnished to the mine from the 10th of February to the month of June, 1825, the plaintiff having supplied the mine from the year 1824 to that time. It was proved, on behalf of the defendant, that before the 10th of February he had entered into a negotiation with two of his co-adventurers for the sale of his shares in the mine, and that in consequence an agree-

[1] *Nolan* v. *Lovelock*, 9 M. R. 360.

ment of that date was drawn up and executed by the defendant and one of the vendees, but that the other had refused to complete his contract. Within a few days after that time the defendant met the plaintiff, and told h m that he had sold his share in the mine to Jones and Campbell, who for the future would be his paymasters, and that he, the plaintiff, would be no longer responsible. The defendant, shortly after this conversation, left the country where he had before been regularly resident as managing director. Upon these facts it was contended for the plaintiff that the notice was conditional, and that inasmuch as the defendant continued to be a partner, the agreement never having been completed, he remained liable and the plaintiff was entitled to a verdict. It was answered for the defendant that a partner may limit his responsibility which is presumptive only, by notice; and that therefore, conceding that the defend nt was a partner, he would not be liable for goods furnished after the notice had been given. The learned judge left it to the jury to say whether the notice had been given, telling them, at the same time, that a partner was liable even after the partnership had been dissolved, unless the party furnishing goods to the firm had notice of that fact. The jury found a verdict for the defendant, and leave was given by the learned judge to the counsel to move to enter a verdict for the plaintiff.

In Michaelmas ter.n, WILLIAMS, C. F. (with whom was HOLCOMBE), obtained a rule to show cause why the verdict should not be entered for the plaintiff, or a new trial granted.

COLERIDGE (with whom was WILDE, Sergt.) now showed cause.

ALEXANDER, C. B.—This question turns entirely upon the construction of the notice, which is, in effect, that the defendant had sold his interest in the mine to certain persons, who, for the future, would be liable for all supplies to the mine, and that he, the defendant, would on that account be no longe: responsible. It is cl ar that the defendant might, by an absolute notice, have discharged himself from all future liability, whether he continued or ceased to be a partner; but this is a representation only that the security of other persons was to be

substituted in his stead. Then, what construction is to be put upon this notice? It should have been left to the jury, as was done in the case of *Willis* v. *Dyson*, (1 Stark. 164) to say whether it amounted to a notice that he would not be answerable for any goods subsequently supplied. I don't find that that question was left to the jury, but only whether or not the notice was given. Upon this ground I think the plaintiff entitled to a new trial. But as the operation of the notice is a question for the jury I do not see how the court can assume to itself their province and direct a verdict to be entered for the plaintiff. We may have a strong opinion upon the subject but still it is a question for the jury and must be left to their consideration only.

GARROW, B.—I am of the same opinion. All the partners of a firm are liable for the debts contracted by that firm; but this responsibility may be limited by express notice by one that he will not be liable for the acts of his copartners. The question is whether the defendant has done that in this case. He states the then condition of the firm, and says—a new order of things is about to take place, by which I shall be discharged from all future liability; not I will not be responsible, but, I have sold my share, and shall in consequence be discharged. If the notice had been of the former description the plaintiff might have declined to supply the mine for the future, but when he is told that the responsibility of others is to be substituted for that of the defendant he is induced to continue the supplies upon the credit of the supposed new partner, and as none such existed I think the defendant, so long as he remained a partner, was liable. This view of the case entitles the plaintiff to a new trial, but I do not see how we can enter a verdict for the plaintiff, the effect of the notice being a question for the jury.

HULLOCK, B.—There are two questions which should have been left to the jury in this case: *first*, whether the defendant had ceased to be a partner, with notice to the plaintiff; and *secondly*, if that question were found in the negative, whether the declaration amounted to an absolute notice that he would not be answerable for any goods subsequently supplied. The learned judge told the jury that the defendant would be liable if the partnership had been dissolved with notice to the plaintiff, and left to them, as the only question,

whether the notice had been given; but the effect and purport of that notice was not submitted to their consideration. The notice in the case of *Willis* v. *Dyson* was much stronger than in the present, and yet in that case Lord Ellenborough left the effect of it as a question for the jury.

It is to be lamented that we have no power to enter a verdict for the plaintiff, and that the case must be again set down to trial; but it is a question for the jury, and we can do no more than grant a new trial.

Rule absolute for a new trial.

VICE v. LADY ANSON.

(7 Barnewall & C., 409; 1 Manning & R., 113; 1 Moody & M., 96; 3 Carrington & P., 19. King's Bench, 1827.)

Holder of share not ipso facto liable. Where, in an action for goods supplied for the purpose of working a mine, it appeared that the defendant had paid money for certain shares and received a certificate that she was a proprietor of those shares, and that she had acknowledged that she was a shareholder, but no assignment of any interest in the mine had been made to her: *Held*, that the action could not be maintained.

[1] **Belief of interest explainable.** The belief that a party is interested in a mine or the expression of that opinion do not conclude a party contrary to the fact.

Assumpsit for goods sold and delivered. Plea, non-assumpsit. At the trial before Lord Tenterden, C. J., at the London sittings after Trinity term, 1827, it appeared that the action was brought against the defendant, as one of the adventurers in a mining company, to recover the price of goods sold, and work and materials furnished by the plaintiff for the working of the mine. The plaintiff himself, when he furnished the goods, had no knowledge of Lady Anson as a shareholder; it appeared that she had spoken and written of herself, in private letters and society, as being one, but she never signed any deed. She had paid her deposits on her shares and had received certificates in the following form: "Wheal Concord Tin and Copper Mine Company, No. 133. These are to certify, that the Viscountess Dowager Anson is the proprietor of the share

[1] *Merrick* v. *Peru Co.*, 3 M. R. 584.

or number 133, being one share of the Wheal Concord Mine, situate in the parish of St. Agnes, in the county of Cornwall, and that her name is duly registered in the act book of said mine, subject to the rules, regulations and orders of the said company; and that the said Viscountess Dowager Anson, her executors, administrators and assigns, are entitled to the profits and advantages of such share.—By order of the directors, as witness my hand, this 14th day of June, in the year of our Lord, 1882. Christopher Vaux, secretary to the said mine." The mine, at one time, before the proposal to form a company, had been in the hands of one Thomas; but it did not appear distinctly in what character he acted, or that any interest had been transferred from him to the company. The attorney-general for the defendant, on these facts, contended that the defendant was not liable. He admitted that there was some evidence to show that at one time she considered herself liable; but though that might be *prima facie* evidence against her, it could not make her so, if, on the other facts she was not. She never became known as a partner, nor was she one in fact, for she never had any assignment made to her of the partnership property, nor did she sign any deed, so as to bring this within the case of *Lawler* v. *Kershaw*, 1 Moody & Malkin, 93. The utmost she can have is a right in equity to call for an assignment of the partnership property; but until that is made she has no interest, for the certificate gives her none: and if she has none she is not a partner. Lord Tenterden, C. J., addressed the jury as follows, see, 1 Moody & Malkin, 99: "It is clear, in this case, that the plaintiff did not actually give credit to Lady Anson, and that she never held herself out to the world as a partner. If, therefore, she is chargeable, she can only be so on the ground that she is really interested; and no mistaken supposition of her own that she was so, would make her liable, unless it were communicated to the plaintiff, so as to mislead him. The partnership, if any, is not strictly a trading partnership; it is one formed for the purpose of working a mine, a species of real estate, and the plaintiff's claim is for labor and goods employed in working that mine. An interest in a real estate can only pass by certain formalities; and it is clear that the certificates are not sufficient to pass it, nor would the registration in the act book of the company, as mentioned in them, even if it were made, of which there is

no proof, be so. Is there, then, any evidence from which you can conclude that Lady Anson ever had any interest in the mines conveyed to her? The history of the mine i n t much explained; but it appears that one Thomas had something to do with it in 1822, before the company was thought of, and we hear of no one else. It is not pretended that Lady Anson derived any interest from any one else, and it is not clear, even, that he had any. If he had none, he could communicate none; if he had any, Lady Anson would be liable or not, as he had transmitted it to her or not. His name is not on the certificates; they do not profess to pass anything from him or to make him accountable for the money paid upon them, or from the profits arising from the mine. Directors are mentioned, but he is not shown to be one of them or in any way connected with them. The certificates, therefore, which clearly do not in themselves pass any interest, seem not even to furnish any evidence that an interest had passed from Thomas, or from any one else, to Lady Anson. See this case reported in 1 Moody & M., N. P. C. 96. The question which you have to consider is, whether it is made out to your satisfaction that Lady Anson had any interest in the mine? I think it is not." *The plaintiff's counsel then elected to be nonsuited.*

F. POLLOCK now moved to set aside the nonsuit. It was not necessary to show that any formal conveyance was executed in order to vest in the defendant an interest in the mine; for the parties engaged in this undertaking may have worked under a license and without having any legal interest in the soil: *Doe, Dem., Hanley* v. *Wood*, 2 B. & A. 724. It was sufficient, therefore, to show that the defendant had agreed to participate in the profits of working the mine. Now there was evidence to show that the defendant had entered into an undertaking, with others working the mine, to participate with them in the profits of the mine. She had purchased shares and had spoken of those shares. That is evidence against her that she had an interest in the working of the mine, and if so, then the articles were supplied for her benefit.

LORD TENTERDEN, C. J.

The plaintiff, at the time when he supplied the goods, did not know that the defendant either had or thought she had any

interest in the mine. He did not, therefore, supply the goods on her credit. The fact of her having thought that she had such an interest, that being wholly unknown to the plaintiff at the time when he supplied the goods, will not make her liable for those goods. Her having expressed an opinion that she was so might be *prima facie* evidence that she had an interest. but the other facts in the case show that she had not any interest. She thought she had an interest because she had paid her deposits and received the certificates, but those certificates pass no interest whatever. It did not appear who the directors were, or that they had any authority to issue such certificates. The defendant, therefore, had no interest in this mine, and is not liable in this action.

Rule refused.

FEREDAY ET AL. v. WIGHTWICK ET AL.

(1 Russell & M. 45. 1 Tamlyn, 250. High Court of Chancery, 1829.)

[1] **All property of a trading concern,** whether real or personal, is partnership assets and is to be first applied in satisfaction of the partnership demands.

Incidents of mining partnerships. A mining concern differs from a common partnership in that: 1. The shares are assignable. 2. The death or bankruptcy of a holder of shares does not operate as a dissolution, although it is in the nature of a trading concern.

[2] **Lien of partner.** When a managing partner, a co-lessee, working mines, becomes indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern.

Usury. Annuity for years originating in an agreement for a loan, and producing more than a return of the principal and five per cent. interest, is usurious.

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[1] "I confess," says Sir J. Leach, M. R., "I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of the partnership trade, continued to be partnership capital and to have to every intent the quality of personal estate; and in the case of *Fereday* v. *Wightwick* I had no intention to confine the principle to the partnership demands. Lord Eldon has, certainly upon several occasions, expressed such an opinion, etc., and general convenience requires that this principle should be adhered to." *Phillips* v. *Phillips*, 1 Myl. & K. 649, 663. But where parties, being tenants in common of land, agree to carry on farming business, which is not a trade, in partnership, and afterward carry on some trade, as collateral to and arising out of the principal business of farming upon the land, the land is not converted into personalty: *Randall* v. *Randall*, 7 Sim. 271.

[2] *Duryea* v. *Burt*, 11 M. R. 395.

In this case six persons, having taken a lease for years of certain mines, and also another lease of the surface lands under which the mines were situated, worked these mines and occupied the surface lands as a joint and partnership concern, dividing the same among them in equal shares. One of these six persons, Turton by name, assigned his shares by way of security for money advanced, and then became bankrupt. He had been manager of the concern, and was greatly indebted to it at the time of his bankruptcy.

The present bill was filed by such of the original partners as continued to be interested in the concern, and by other persons who either were the representatives of deceased original partners, or claimed as purchasers of shares. The prayer was that the partnership property might be sold and the partnership accounts taken, and that it might be declared that the shares of the partner who had become bankrupt, ought, in the first place, to be applied in repaying to the partnership the debt which he had incurred in the management of the concern.

The principal question in the cause was, whether the plaintiffs were entitled to the relief last stated. The defendants, who claimed under the bankrupt partner, insisting that the common principles of partnership were not applicable to the case of mines, which were of the nature of real property.

Mr. BICKERSTETH and Mr. ROLFE, for the plaintiffs.

Mr. LOVAT, for defendants in the same interest with the plaintiffs.

Mr. TINNEY, for the assignees of Turton. Mr. PEMBERTON and Mr. WILSON, for incumbrancers of Turton's shares, *contra*.

THE MASTER OF THE ROLLS.

The general principle is that all property, acquired for the purpose of a trading concern, whether it be of a personal or real nature, is to be considered as partnership property, and is to be first applied accordingly in satisfaction of the demands of the partnership. It is true a mining concern differs in

some particulars from a common partnership. The shares are assignable and the death or bankruptcy of the holder of shares does not operate as a dissolution, but it has been repeat edly held to be in the nature of a trading concern.

In *Crawshay* v. *Maule*, Lord Eldon expressed a doubt whether, if persons previously entitled as tenants in common to mines were to form a mining concern, the general principles of a partnership would apply to such a case, and I am not aware that the particular point has ever been decided; but the distinction here is, that the interest in the mines was expressly acquired for the purpose of a partnership, and the general principle is therefore to be applied to it.

The defendant Wightwick claimed under Turton, as the purchaser of an annuity of £664, 18*s*. for the term of eleven years and a half. This annuity was secured on Turton's shares, and the consideration paid for it was a sum of £4,000.

The purchase deed contained a covenant to pay the annuity half yearly; and the bankrupt also gave to the purchaser twenty-three promissory notes, being each for a half year's payment, payable respectively at the successive times when the successive half yearly installments of the annuity would become due. It appeared in evidence that the twenty-three half yearly payments would pay the sum of £4,000, together with interest at nearly £12 per cent. per annum, and a question was made whether this transaction was usurious.

THE MASTER OF THE ROLLS.—With respect to this question of usury, I shall not refer to the old cases which have been cited. This, in effect, is an agreement to repay the principal sum of £4,000, with interest, by twenty-three installments; and as it appears that the interest thus paid will exceed legal interest, the transaction is plainly usurious. See *Challingworth* v. *Challingworth*, 8 Sim. 404.

FAWCETT v. WHITEHOUSE.

(1 Russell & M. 132. High Court of Chancery, 1829.)

[1] **Clandestine bonus to partner.** A person employed, on behalf of himself and his copartners, in negotiating the terms of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of £12,000 was paid in pursuance of such stipulation, the party receiving it was declared to hold it in trust for the partnership.

[2] **Retiring and incoming partners as parties.** Before the transaction was discovered one of the partners withdrew, and subsequently another partner assigned a share in the stock and in his proportion of this claim to persons then admitted into the concern. *Held*, that the retiring, the continuing and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared.

Messrs. Knight & Co. were lessees for a long term under Hill and Hopkins, of certain lands and mineral property, with the iron works and furnaces thereunto belonging, situate at Verteg, in the County of Monmouth, where they carried on extensive business as iron masters for a number of years.

Latterly, however, they had found the works to be unprofitable and had, in consequence, discontinued their operations; and as the premises were subject to a heavy rent, they became anxious to relieve themselves from further liability by dissolving the company, and giving up or assigning their lease. With that view they set on foot a variety of negotiations with different persons, chiefly through the agency of Benjamin Whitehouse, whom they employed to look out for some enterprising capitalist who might take the property off their hands; and finally, in November, 1818, they concluded an agreement, (which was afterward, on the 2d of February, 1819, carried into effect by a formal deed,) whereby, in consideration of the same yearly rents and covenants as were contained in their lease from Hill and Hopkins, they agreed to demise the lands, mines, and other premises comprised in that lease, together with certain contiguous freeholds of their own, unto William Fawcett, Charles Shand and the said B. Whitehouse, for a term of twenty-four years. Contemporaneously with

[1] *Collins* v. *Case*, 1 M. R. 91: *Caldwell* v. *Leiber*, 7 Paige 483.
[2] *Babcock* v. *Stewart*, 11 M. R. 447; *Jones* v. *Clark*, 11 M. R. 473.

this transaction a copartnership was formed between Fawcett, Shand and Whitehouse for the purpose of working the mines, of which they obtained possession by virtue of their underlease from Knight & Co., and they accordingly continued in partnership as iron masters, each holding an equal third share in the leasehold property and the stock, till the month of November, 1820, when Shand withdrew from the concern, and assigned all his interest in the premises, together with his share in the business, to the two remaining partners, Fawcett, and Whitehouse, who carried on the trade as before. In the course of the following year several other persons were introduced into the firm, and on the 23d of October, 1821, when besides Fawcett and Whitehouse it consisted of James Hunt, Henry Hunt, Kenrick and Priestley, a new deed of copartnership was executed specifying the amount of capital advanced by the different partners, and declaring the shares which, under the arrangement then made, they were each to be considered as holding in the stock and profits of the company. Shortly afterward Whitehouse also became desirous to retire, and by an instrument bearing date the 2d of February, 1822, he released and assigned all his rights and interests under the lease and copartnership deed to the remaining partners, in consideration of a sum of £13,500.

The bill which was filed by Shand, as an original partner, and by Fawcett, J. Hunt, H. Hunt, Priestley and Kenrick, as the continuing partners, against B. Whitehouse, set forth these transactions in detail. It then went on to state that sometime after the retirement of Whitehouse from the firm the plaintiffs had discovered, as the fact was, that immediately on the execution of the deed of the 2d of February, 1819, the defendant had received from Knight & Co. the sum of £12,000. It alleged that payment to have been made in pursuance of a previous agreement, whereby Knight & Co. had undertaken to accommodate Whitehouse with £12,000, (at first in the form of a conditional loan, which was afterward converted into an absolute gift,) for the purpose, as was pretended, of enabling him to advance the capital required for the partnership into which he was then entering, but in reality by way of premium for his services in procuring responsible tenants for the premises, and thereby relieving the former lessees from their lia-

bilities to Hill and Hopkins. It is alleged that this agreement was studiously concealed by Whitehouse from the knowledge of his copartners, and that it was made at the very time he was engaged on their behalf and his own in negotiating the treaty for the underlease, when it was his especial duty to obtain, as he frequently professed he had done, the most favorable terms for the new company. It charged that the plaintiffs, Fawcett and Shand, in acceding to the terms of the underlease, and in embarking with Whitehouse in the joint adventure, had been mainly influenced by his representations, and had relied with implicit confidence on his integrity and honor; that inasmuch as he had been confidentially employed for their common interest, he was not entitled to derive any private pecuniary benefit from the transaction without communicating an equal share of it to them; that by accepting the alleged bonus from Knight & Co. he had intercepted an advantage that must otherwise have accrued to the partnership, which had, of course, sustained a loss in the terms of the contract to an equal amount; that under these circumstances his receipt of the £12,000 was, in equity, a fraud upon his partners; and that, as to two thirds of that sum, he ought to be considered a trustee who had received the money for their use.

The bill further alleged, that doubts having arisen with respect to the rights acquired in this claim by the new partners under the deed of October, 1821, the plaintiff, Fawcett, by a subsequent instrument, declared the true intent of that deed to be that the claims should vest in the continuing partners, respectively, in the same shares and proportions as the rest of the copartnership stock. The bill prayed a declaration that the defendant had received the £12,000 on behalf of himself and the plaintiffs Shand and Fawcett equally, and that he was a trustee, as to one third part of that sum, for Shand, and as to another third part for the other plaintiffs, or for the plaintiff Fawcett alone; and that the plaintiffs might be declared respectively entitled to receive the same from him accordingly.

The cause was heard on the 17th of December, 1825, before Sir J. Leach, then vice-chancellor, when his Honor made a decree according to the prayer of the bill, and charged the

defendant with interest at four per cent. on two thirds of the amount he had received and directed him to pay the costs.

The defendant appealed against that decree; the suit, having become abated by his death, was subsequently revived, and the rehearing was now prosecuted by his personal representatives.

The particular details of the case, and the substance of the evidence adduced in support of it, are given fully in the judgment of the lord chancellor.

The SOLICITOR GENERAL and Mr. ROLFE, for the plaintiffs.

Mr. HORNE and Mr. ROUPELL, for the defendant.

THE LORD CHANCELLOR.

From the importance of the question in point of amount, and also from the circumstances affecting, to a certain degree, the character of individuals concerned in the transaction, I thought it right before I finally disposed of the case to look minutely into the evidence, both on the one side and the other, adduced in the course of the cause.

The facts of the case were these: Messrs. Hill & Co. were the lessees of mines and certain iron works in Wales, called the Verteg iron works. They underlet their interest to Knight & Co. for a long term, at a rent of £2,600 a year, and on condition that the premises should be kept in repair. About twenty-four years of that term remained unexpired. In consequence either of some difference among themselves or of some mismanagement, Messrs. Knight & Co. discontinued the works. The works having remained unproductive for a period of five years, they were extremely desirous to get rid of the concern; so much so that they had offered the sum of £26,000 or £28,000 to Messrs. Hill & Co., on condition that the latter would accept a surrender of the lease, which, however, they refused to do. Upon this refusal they became desirous, if possible, either to assign the lease to some persons of respectability who were competent to carry on the works, or in some shape or other to dispose of the concern. They had purchased freehold property contiguous to the mines and

of importance to them on account of the limestone it contained. They were willing, according to the evidence of Mr. Hancock, on condition that any person would accept an assignment or underlease of the mine, to give up their whole interest in the freehold property, and, according to the evidence of another witness, they were willing, also, to make a considerable pecuniary sacrifice in addition to the surrender of the freehold property. They entered into a communication and correspondence with the defendant, who was well acquainted with transactions of this nature, and undertook to endeavor to procure persons of respectability and character to engage with him in this concern. On behalf of Knight & Co., the negotiation was conducted by Mr. Hancock, one of the partners. In the month of October, 1818, Mr. Hancock wrote a letter which has been principally relied upon on the part of the defendant, stating the terms on which Knight & Co. were disposed to part with the works. Those terms were to be an assignment of the lease subject to the existing rents and covenants, and an absolute gift of the freehold property. Nothing more was stated in the letter, which was addressed to Mr. Whitehouse, who was to have the opportunity of using it for the purpose of inducing other persons to embark with him in the adventure. In addition, however, to the terms mentioned in that letter, probably at the same period, though that does not very distinctly appear—certainly early in the progress of the negotiation—a particular advantage was stipulated for in favor of Mr. Whitehouse, upon the nature of which a great deal will depend. The stipulation was, that if the arrangement should be ultimately completed, and if Mr. Whitehouse should succeed in procuring respectable persons to join him in the undertaking, Knight & Co. should advance to him the sum of £12,000 without interest, half of which was to become his own property, unconditionally, at the end of seven or eight years, and the rest of it was to become his absolute property at the expiration of the term, provided that up to that period they had been indemnified by the partnership against the clauses in the lease granted by Hill & Co. In the event of any default, the repayment was to be secured by a bond. When this arrangement was made by Mr. Whitehouse, he in the first instance communicated the proposed

terms to Messrs. Jeavons, who refused, however, to accept them. Afterward, a communication was made to Messrs. Fawcett and Shand, and they eventually consented to engage in the concern with Mr. Whitehouse. Before they finally decided, however, Mr. Shand himself went into Wales, for the purpose of inspecting the works; and as he did not rely entirely on his own judgment, application was made to a friend of the parties, Mr. Jones Wilkinson, who was acquainted with business of that description, to accompany Mr. Shand for that purpose. After having carefully inspected the premises, Mr. Wilkinson and Mr. Shand returned to Mr. Fawcett, and the representations which they made as to the state of the works and the nature of the property correspond with the representations of Mr. Whitehouse. Under these circumstances Messrs. Fawcett and Shand determined to engage in the undertaking. Accordingly, on the 30th of November, in the year 1818, they proceeded, with the view of concluding the agreement, to Birmingham. A few days previous to that time Mr. Whitehouse had instructed Mr. Fellowes, who was his own private solicitor as well as his solicitor for the purpose of the partnership, to draw up the agreement relative to the stipulation as to the £12,000. The agreement so drawn entirely got rid of the provision with respect to the bond, and converted what was said to be a loan, but was in fact a conditional advance, into an absolute gift. The agreement, in this shape, was delivered to Mr. Whitehouse, who, on the day before the meeting at Birmingham, employed the son of Mr. Fellowes to copy it, stating as his reason for so doing that he preferred employing young Mr. Fellowes to employing a clerk of the house, because he wished the transaction to be kept secret. On the next day the parties met by appointment at the Royal Hotel at Birmingham. Previous to the meeting at the Royal Hotel, a meeting was held at the Swan Inn, not of the partners of the firm of Knight & Co., but of the other parties. Much conversation took place on that occasion; and in the course of that conversation it is sworn by three witnesses who were present that Mr. Whitehouse stated to Messrs. Fawcett and Shand that he had done as much as he possibly could for them; and that Mr. Fawcett or Mr. Shand said in reply, he was satisfied Mr. Whitehouse had done all he could for them, and that they

wished him to finish the transaction, for they were wholly ignorant of mining concerns. They afterward met at the Royal Hotel for the purpose of concluding the transaction. Some difference arose with respect to the terms of the agreement as to whether it should be an assignment or an underlease; and Mr. Shand and Mr. Fawcett were willing so far to depart from the original arrangement as to agree that it should be an underlease, which Mr. Whitehouse at first objected to; but he afterward acquiesced in the alteration. As soon as the terms of this agreement were arranged, the defendant called three of the partners of the house of Knight & Co. out of the room, for the purpose of settling with them the terms of his own private agreement. The agreement as drawn by Mr. Fellowes, was handed to them. They objected to it as a departure from their original intention which was, as it was stated, that the £12,000 should be a loan, whereas it was now made an absolute gift. In consequence of the demur, some further negotiation ensued between the defendant and those members of the firm of Knight & Co. who were then present. On this point, the representation made by Whitehouse is material. He said, "I have procured you persons of respectability as partners in this concern; you run no risk; there is no chance whatever of the works being again thrown upon your hands; you ought, therefore, to release me from the bond, and not allow it to hang over my head." They acquiesced in these reasons.

The stipulation relative to the bond was omitted, and the agreement was signed, with some alterations, as drawn by Mr. Fellowes. It was then delivered into the hands of young Mr. Fellowes, in order that he might get it stamped; and at that time the defendant stated his desire that he would show it to no living soul; and he at the time represented over and over again to Mr. Fellowes that he would not sign the other agreement until this, his particular and personal agreement, had been previously executed. Such are the facts of the case; and the first observation that occurs is, that in this transaction Mr. W. was negotiating for himself and his future partners as an agent for the intended partnership. That he was acting as their agent, the circumstances of the transaction show beyond the possibility of doubt. It is sworn to in express

and distinct terms by Mr. Hancock and Mr. Wilkinson, and it is evidenced by the conversation already referred to, which passed at the Swan Inn. It is said on the other side, that he could not be considered as absolutely the agent in the negotiation, but that Messrs. Fawcett and Shand acted for themselves in the manner which they thought most calculated to promote their own interest. Mr. Shand went himself to inspect the works, and he employed a friend, Mr. Wilkinson, for the purpose of accompanying him in his survey: they did not, therefore, absolutely rely on the representations of Mr. Whitehouse, but chose to have recourse to an agent of their own, in order to ascertain how far his statements were correct. Undoubtedly that is the fact; they did not trust implicitly to the representations made by Mr. Whitehouse, with respect to the property and the nature of the works, and they deemed it prudent to apply to another person for the purpose of learning whether those representations were true. But Mr. Wilkinson had nothing whatever to do with the treaty; the treaty was exclusively managed by Mr. Whitehouse. It is said, also, that at the meeting at which the transaction was finally completed, the terms originally stipulated for by Mr. Whitehouse were departed from—and they certainly were departed from in one particular, in the adoption of an underlease instead of an assignment; and in that alteration Messrs. Shand and Fawcett unquestionably acted for themselves, and Mr. Whitehouse acquiesced in it. But that does not in the least do away with the effect of this, that in all the arrangements with respect to the pecuniary terms and conditions, the business was conducted entirely by Mr. Whitehouse, acting on behalf of Messrs. Fawcett and Shand. If, therefore, Mr. Whitehouse was placed in the situation of being the agent of two other persons, while he was acting also for himself, and he stipulated for a private advantage which was to be kept secret, and in which his copartners were not to share, it is quite impossible for this court to sanction such a transaction; and the question, therefore, resolves itself into this: What was the effect of the private stipulation and what the nature of the private advantage? We are not to be misled by terms; we must consider what the transaction really was. It is said this was a loan of £12,000, in order to enable Mr.

Whitehouse to bring his capital into the concern. But it was not a loan properly so called; it was £12,000 advanced without interest, and to be repaid only in a certain event; being, in effect, a gift upon condition, liable to be defeated if the covenants in the other and principal agreement were not duly complied with, and being intended to secure the due performance of them. That such was the nature of the transaction is evidenced by the subsequent conduct of the parties, because the moment the partners were known, the moment it was seen that no risk was to be run, that representation was made by Mr. Whitehouse to the other parties: "You are perfectly secure; these are persons of responsibility and character; there is no danger of the works being again thrown on your hands, and, therefore, there is no reason why this bond should be allowed to hang over my head;" upon which they consented to withdraw the stipulation relative to the bond, and converted that which before was a conditional into an absolute gift. But whether it was conditional or absolute does not vary the nature or substance of the case. If it was a conditional gift, still it was a benefit to this party, who was one of the three individuals who entered into the partnership and who himself negotiated the terms of it. It is impossible for this court to sanction such a proceeding. When three persons are engaged in negotiating a partnership, and the negotiation is conducted by one as the agent of the other two, he should not, in my opinion, be allowed to make a private advantage for himself. That he felt it was an improper proceeding is proved by his anxiety to keep it secret from his partners; and it was not till after a considerable time had elapsed that it came to light. It appears to me, therefore, upon these grounds, that the decision of the vice-chancellor was correct; and that as to two thirds of the sum of £12,000 the defendant must be considered a trustee for the partnership.

An objection was taken in point of form, that Hunt and the other new partners had been improperly joined as plaintiffs upon this record. When, however, the situation in which they stood is considered, that will appear to have been perfectly proper. Mr. Fawcett and Mr. Whitehouse had stipulated, when the new partners were admitted, that they should come into the concern entitled to all the advantages, and subject to all the conditions, of the original partners. Whatever

benefits the old partners had enjoyed, it was stipulated should be shared in by the new. This was one of the original benefits of the concern; and as it was conceived that this was not expressed with sufficient distinctness, a deed was afterward executed, by which it was expressly provided that, as to the proportion to which he was entitled, Mr. Fawcett should be a trustee for the Hunts, Kenrich, Priestley and himself. I think, therefore, they had such an interest as rendered it proper they should be joined as plaintiffs.

Under these circumstances, I am of opinion that the decree of the vice-chancellor ought to be affirmed; and from the nature of the transaction, and the clearness of the evidence establishing its character, it ought to be affirmed with costs.

NOTE.—The following passage, taken from the shorthand writer's note of the vice-chancellor's judgment in the preceding case, sums up the grounds on which his Honor rested the decree. "It appearing upon the evidence that Whitehouse was in truth the person who originated the contract with Knight & Co., on the part of Fawcett and Sh nd, and it appearing, also, upon the evidence he represented, that he stood on so particular a footing of connection with Knight & Co. that he could obtain better terms from them than any stranger could; and that he further represented, on the day when the agreement between Knight & Co. and Fawcett, Shand and himself was signed, that he had obtained *the best terms possible*, I am of opinion, upon these grounds, and considering the situation in which he stood, that he was not at liberty to take to his own profit any part of that consideration which Knight & Co. were willing to pay to get rid of the business, but that he was bound to obtain the best terms possible for the intended partnership, consisting of Fawcett, Shand and himself, and that all he did obtain will be considered as if he had done his duty and had actually received the £12,000 for the new partnership, as upon every equitable principle he was bound to do. I am of opinion, therefore, that this is what must be called in a court of equity a fraud on the part of the defendant. It was, in fact, selling his intended partners for £12,000, and when he received the money, Fawcett became entitled to one third and Shand became entitled to another third of it. Shand is now entitled to his £4,000, and Fawcett, having communicated his interest in the former partnership to four other persons, they, with him, are entitled to the other £4,000.

MUSIER v. TRUMPBOUR.

(5 Wendell, 274. Supreme Court of New York, 1830.)

[1] **Burning lime on shares.** Where two persons agreed to burn lime on shares, one to fill a kiln with stone and the other to burn the kiln and furnish the necessary wood for the purpose, the lime to be equally divided between them, it was held, that a technical partnership existed between the parties.

Suit at law between partners. Notwithstanding the partnership, an action at law may be maintained by one partner against the other for a balance due him growing out of the partnership transaction, if there be but a single item to liquidate.

Pleadings and evidence in justice's court. The same nicety and precision is not required in pleadings joined in a justice's court which are required in courts of record; and evidence will be received under pleadings joined in the former which could not be received under pleadings joined in the latter.

Error from the Greene Common Pleas. Musier sued Trumpbour in a justice court and declared for about 200 bushels of lime; the defendant pleaded the general issue, and gave notice of set-off. The cause was tried before the justice, and judgment rendered for the defendant for $2.60. The plaintiff appealed to the Greene Common Pleas, where the cause was tried on the issue joined before the justice. On the trial, the counsel in opening the cause stated that the plaintiff would prove that he was the owner of a lime kiln; that it was agreed between him and the defendant that he would fill the kiln with stone, and that the defendant would furnish the necessary wood and burn the kiln into lime which was to be equally divided between them; that the defendant took more than his proportion of the lime and subsequently inquired of the plaintiff how much he owed him on account of the lime, who answered $12.50, which the defendant promised to pay as soon as he got returns from a cargo of hay which he had shipped to New York; on which opening the defendant insisted that the plaintiff ought to be nonsuited, admitting the facts to be as stated by him, because, 1. The facts showed a partnership between the parties, and the action could not be sustained unless a balance had been struck, and that there had been

[1] *Griffith* v. *Buffum*, 22 Vt. 181; *Wadsworth* v. *Manning*, 4 Md. 59; see *La Mont* v. *Fullam*, 133 Mass. 583.

a promise to pay ; and, 2. That under the declaration in the cause evidence of a balance struck and promise to pay was inadmissible. The court sustained the objections taken by the defendant and nonsuited the plaintiff; who excepted to the decision of the court and sued out his writ of error.

VAN ORDEN & DORLON, for plaintiff in error.

POWERS & DAY, for defendant in error.

SAVAGE, Ch. J., delivered the opinion of the court.

I am inclined to the opinion that a technical partnership existed as to the lime; each contributed materials and labor, and the lime was to be equally divided be ween the parties; but I apprehend it is not necessary to send these parties into a court of chancery to settle a dispute about $12.50. If there had been a partnership there was but a single item to liquidate, the partne ship being at an end; and in such case it was held by Lord Ellenborough, in *Robson* v. *Curtis*, 1 Stark. 63, that the difficulty as to partnership would disappear. On this point, therefore, I am of opinion that the plaintiff should not have been nonsuited.

On the other point, also, I think there was error. In justice's courts, where the pleadings are usually conducted by the parties themselves, that technical nicety and precisi on are not required which are required in courts of record, unless the pleadings are demurred to: 5 Johns. 122. The declaration is to be liberally construed, so as, if possible, to meet and embrace the proof: 10 Johns. 104; 3 Cowen, 187, 278. I think the proof of a promise should have been received.

Judgment reversed, with venire de novo.

CARTER v. WHALLEY ET AL.

(1 Barnewall & Adolphus, 11. King's Bench, 1830.)

[1] **Liability of withdrawing partner—Notice.** S. and others carried on business under the name of the "Plas Madoc Colliery Company." S. withdrew from the firm, which afterward became indebted to C., no notice having been given to C. or the public of S.'s withdrawing. *Held*, that S. was not liable for the debt, there being no sufficient evidence that he had ever, while a partner, represented himself as such to C., or appeared so publicly in that character that C. must have been presumed to know it.

Assumpsit, by the indorsee against the defendants, as acceptors of a bill of exchange. Plea, by Whalley, the general issue; judgment by default against the other defendants. The bill, dated Birmingham, May 16, 1829, was drawn by Jackson upon "The Plas Madoc Colliery Company, near Ruabon, North Wales," payable to Jackson's order; accepted, per procuration, by Veysey, for the company, and indorsed by Jackson to the plaintiff.

At the trial before Lord TENDERDEN, C. J., at the London sittings, after Easter term, 1830, it was proved that Carter, a person residing at Birmingham, had discounted the bill for the Plas Madoc Colliery Company at the request of Jackson, who managed their pecuniary affairs, and who remitted the proceeds of the bill to them in Wales. The company, some time before this transaction, consisted of the four defendants, but in April, 1829, Saunders withdrew from the partnership. It did not appear that any notice of this fact had been given to the public or to Carter. There was no proof of any dealing between Carter and the firm before May, 1829, when the bill was drawn. For a short time, in 1828, the company had an account at the Wrexham Bank in North Wales, and Saunders was known there as one of the partners. He had been seen at the colliery in April, 1828, taking some part in the getting up of a steam engine. Jackson lived at Birmingham, and an attorney who witnessed the instrument by which Saunders made over his share in the partnership, and who knew all the defendants at that time, also resided there. The

[1] *Waller* v. *Davis*, 59 Iowa, 153; *Heath* v. *Sansom*, 1 Nev. & Man. 104.

plaintiff had stated in December, 1829, that he did not know the defendant Whalley at the time when the bill was drawn. On this evidence Lord Tenderden was of opinion that the action was not sustained, Saunders having withdrawn from the firm before the acceptance was given, and that the plaintiff could not avail himself of the want of notice, as it did not appear that he had ever dealt with the company while Saunders was a member, or that the partnership during that time had been so known at Birmingham, where the plaintiff carried on business; that he must be supposed to have looked upon Saunders as a partner, in default of notice to the contrary. The plaintiff was therefore nonsuited.

CAMPBELL now moved for a rule to show cause why the nonsuit should not be set aside and a new trial had. The plaintiff was entitled to consider Saunders as one of the acceptors, having had no notice of his withdrawing from the firm. *Evans* v. *Drummond*, 4 Esp. N. P. C. 89, may appear an authority to the contrary; but that was the case of a dormant partner; where the partner has been ostensibly such and retires, there must be notice of that fact to exempt him from future liability: *Parkin* v. *Carruthers*, 3 Esp. N. P. C. 248. In that case the plaintiff was not proved to have had any dealing with the firm as at first constituted; Le Blanc, J., laid it down as a clear rule of law, that where there is a partnership of any number of persons, if any change is made in the partnership and no notice is given, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties who first composed the firm. Here no notice whatever was given, though Saunders had been known as a partner during the continuance of the partnership.

LORD TENTERDEN, C. J., read over the evidence and restated the opinion expressed by him at the trial.

LITTLEDALE, J.—It was incumbent on the plaintiff in this action to prove a contract between the parties whom he named as acceptors and himself as indorsee. If they were all partners when the acceptance was given by Veysey that contract is established. But it appears that they had ceased to be so, Saunders having withdrawn. Then it is said that the defend-

ant ought to have proved some notice received by the plaintiff of this separation; and it is true that if the plaintiff at any previous time knew Saunders to be one of the partners, such notice ought to have been shown. Now, where all the names in a firm appear, it may be presumed that every one knows who the partners are; but where there is only a nominal firm, as in the present case, the fact of such knowledge must be ascertained by express proof. No proof of that kind appears here; and I therefore think that no contract was established between the plaintiff and Saunders.

PARKE, J.—The plaintiff was bound to show an acceptance by four parties; that is, that Veysey, who did accept the bill, was authorized to do so by the three others named in the declaration. Saunders had given no direct authority; he was not a partner at the time. But he may by his conduct have represented himself as one, and induced the plaintiff to give him credit as such, and so be liable to the plaintiff. Such would have been the case if he had done business with the plaintiff before as a member of a firm, or had so publicly appeared as a partner as to satisfy a jury that the plaintiff must have believed him to be such; and if he had suffered the plaintiff to continue in and act upon that belief, by omitting to give notice of his having ceased to be a partner, after he really had ceased, he would be responsible for the consequences of his original representation, uncontradicted by a subsequent notice. But in order to render him liable on this ground, it is necessary that he should have been known as a member of the firm to the plaintiffs, either by direct transactions or public notoriety; in the present instance that was not so. The name of the company gave no information as to the parties composing it, and the plaintiff did not show that Saunders had dealt with him in the character of a partner, or had held himself out so publicly to be one as that the plaintiff must have known it. Carter, the plaintiff, lived at Birmingham; it should have appeared that there had been such a dealing at that place by Saunders, or that his connection with the company had been so generally known *there* that a knowledge of it by Carter must have been presumed. There having been no evidence for the jury on these points, I think the nonsuit was right.

Rule refused.

FAITH v. RICHMOND ET AL.

(11 Adolphus & Ellis, 339. Queen's Bench, 1840.)

[1] **Use of unusual firm name in signing note.** Where a partner, accustomed to issue notes on behalf of the firm, indorses a particular note in a name differing from that of the partnership, and not previously used by them, which note is objected to on that account in an action brought upon it by the indorse , the proper question for the jury is, whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the indorser must be taken to have issued the note on his own account, and not in the exercise of his general authority as partner.

Idem—Facts of the case. So held where a partner in "The Newcast'e and Sunderland Wall's End Coal Company" drew a note in the name of "The Newcastle Coal Company," and made it payable at a bank where the first mentioned company had no account.

Assumpsit. The declaration stated that defendants, on, etc., made their promissory note in writing and delivered the same to John Botcherby, and thereby promised, etc. (Count in the usual form by J. B.'s indorsee on a note for £350, payable at six months.) Barbour and Hannay pleaded that they did not make the note as in the declaration alleged, and on this plea issue was joined. Richmond suffered judgment by default.

On the trial before Lord DENMAN, C. J., at the sittings in London after Michaelmas term, 1839, it appeared that Richmond, Barbour and Hannay carried on business in partnership under the name of "The Newcastle and Sunderland Wall's End Coal Company." The note declared upon was drawn by Richmond and was as follows:

LONDON, April 28, 1837.

Six months after date we promise to pay to Mr. John Botcherby, or order, three hundred and fifty pounds, for value received.

For the Newcastle Coal Company,
WILLIAM RICHMOND, Manager.

At the London and Westminster Bank, 9 Waterloo Place.

There was no proof of a specific authority to draw such a note. The defendants' firm had no account at the London

[1] *Palmer* v. *Stephens*, 1 Denio, 472; *Kirk* v. *Blurton*, 1 M. & W. 283.

and Westminster Bank. It was objected that, admitting Richmond to be entitled as a partner to make promissory notes on behalf of the Newcastle and Sunderland Wall's End Coal Company, yet this was not a note drawn on their behalf, and could not bind them, "The Newcastle Coal Company" not being their firm, nor the London and Westminster Bank one with which they dealt. The lord chief justice, in summing up, observed that the three defendants were partners and Richmond might draw bills or notes as their agent, and that, if he had done so in the name of the Newcastle and Sunderland Wall's End Coal Company, or if the plaintiff had been used to deal with them as the Newcastle Coal Company, the defendants would have been bound; but he left it to the jury to say, on the evidence, whether the note in question was one which Richmond, as a partner in the first mentioned firm, had authority to draw. Verdict for the defendants, Barbour and Hannay.

Mr. SMITH now moved for a new trial on the ground of misdirection. The lord chief justice ought not to have left it to the jury to say whether Richmond was authorized to make the note, because, if it was a partnership note, authority was to be inferred from his being a partner. The real question was whether the firm was known by the name used on this note; not as the jury were led to suppose, whether Richmond had authority given him to draw this particular instrument. [Lord DENMAN, C. J.—I do not think the case was put so.] If there was sufficient evidence that the name here used did in fact designate the partnership, a slight irregularity in the description could not invalidate Richmond's act. In *Williamson* v. *Johnson*, 1 B. & C., 146, the managing partner had been used occasionally to indorse bills in names which did not accurately describe the existing firm. Abbott, C. J., held, that as the partner had been in the habit of issuing bills so indorsed there was sufficient evidence of an indorsement by the then firm, in an action by the endorsee against the acceptor; and the court also was of that opinion. Holroyd, J., observing that evidence of the partner's handwriting would, as between third persons, have been sufficient without proof of any usage on his part to indorse in this manner. In the present case it did appear from the evidence that the company had no very

fixed name or style. [LORD DENMAN, C. J.—The question I put, though I may not have explained myself sufficiently, was whether the deviation from the real partnership name was so great as to show that Richmond must be considered as making the note on his own account, and not entitled to bind the firm by it; or whether the style used, though slightly varying from that of the firm, was essentially the same.]

LITTLEDALE, J.—There is no ground for a rule. Richmond had authority, as a partner, to make notes in the name of the firm. It does not appear that they empowered him to use any name but that which the firm usually went by. In *Williamson* v. *Johnson* there was evidence that the managing partner had on some former occasions indorsed bills in the name objected to. I do not understand that the lord chief justice put it to the jury whether Richmond had authority to sign this particular note, but whether the general authority which he had enabled him to draw such a note.

COLERIDGE, J.—In an ordinary case of this kind the only question would be whether the person making the note was a partner. But here a further question arises, whether, being a partner, he had authority to sign such a note; and it appears that he had not.

LORD DENMAN, C. J.—In this case Richmond had authority to make notes as a partner in the company, but the note in question described a different firm; and the question was whether the evidence raised any exception to the general rule as to the exercise of a partner's authority. I asked the jury whether the designation used, though inaccurate, was substantially that of the firm. But the name was different, and the note was made payable at a place where they never kept money.

Rule refused.

TREDWEN v. BOURNE.

(6 Meeson & Welsby, 461. Court of Exchequer, 1840.)

Evidence to prove partnership liability. Where a mining company was formed on a capital of £30,000, in 3,000 shares, and 2,000 shares only were actually subscribed for, of which the defendant took 100: *Held*, that letters subsequently written by him to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to show that he authorized the directors to proceed in the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied to the mines on the order of the directors.

[1] **The members of a mining company have authority** by law (in the absence of any proof of a more limited authority) to bind each other by dealings on credit for the purpose of working the mines, if that appears to be necessary or usual in the management of mines.

Debt for goods sold, and on an account stated. Plea, *nunquam indebitatus*. At the trial before ROLFE, B., at the last assizes for Cornwall, it appeared that the action was brought against the defendant as a shareholder in the "Trewalfas tin and copper Mining Company," to recover the price of coals, timber, candles, etc., furnished in 1838 and 1839 to the Trewalfas mine, in Cornwall, belonging to the company. It appeared, from the evidence of the clerk of the company, that it was formed in the year 1837, the prospectus stating that the capital was to be £30,000, in 3,000 shares of £10 each. The defendant, who resided in Liverpool, took 100 shares; in all 2,000 only were disposed of. There were directors, a secretary and other officers, and an office in London at which the business of the company was transacted. The mines belonging to the company were worked, and mineral raised and sold, but no profits were made by the concern; the goods in question were supplied on the order of the directors, and were necessary for the ordinary use of the mine. There was no evidence that the defendant had ever been at the mine, or had attended any meetings of the company; but two letters signed by him and several other shareholders, of the dates of November, 1837, and February, 1838, being requisitions to the directors for a meeting to remove one of their body, were

[1] *Manville* v. *Parks*, 7 Colo. 128; *Nolan* v. *Lovelock*, 9 M. R. 360; *Burgan* v. *Lyell*, 11 M. R. 287.

put in. It was objected for the defendant, that there was no evidence to charge him in this action; that there was nothing to show that the directors, who actually made the contract with the plaintiff, had any authority, express or implied, from the defendant to do so. The learned judge thought there was evidence to go to the jury, and left the case to them, with the direction that if they were satisfied the defendant was a shareholder, and knew of the concern being carried on by the directors and the parties in their employ in the manner it was, he was liable in this action. The jury found a verdict for the plaintiff—damages, £182 4*s*.—leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that there was no evidence to charge the defendant.

CROWDER now moved accordingly.—First, this company having been originally constituted on the condition that it should be carried on with a capital of £30,000 in 3,000 shares, and 2,000 only having been actually taken, the defendant can not be liable as a shareholder, unless upon proof that he assented to its being carried on with the smaller amount of capital (*Pitchford* v. *Davis*, 5 M. & W. 2), and there was no such proof in this case. It is clear that the mere circumstance of his being a shareholder is not sufficient to render him liable: *Vice* v. *Lady Anson*, 7 B. & C. 409, 1 M. & R. 113; *Dickinson* v. *Valpy*, 10 B. & C. 128; 5 M. & R. 126; *Bourne* v. *Freeth*, 9 B. & C. 632, 4 M. & R. 512. There was no proof that the defendant had attended any meetings of the company; nor were any deeds and documents put in to show that he had done any act as a partner. [PARKE, B.—His letters clearly show that he knew the concern had begun, and that he was dissatisfied with the management of it. The sole question is, whether there was evidence to go to the jury of the defendant's having authorized the directors to carry on the concern for his benefit.] There was no evidence whence an authority to them could be implied to pledge his credit to persons supplying goods on their order.

But, secondly, a *mining* differs in this respect from an ordinary *trading* partnership. It is in the latter only that the members give each other a general authority to bind them as partners: per Lord Tenderden, C. J., in *Vice* v. *Lady Anson; Dickinson* v. *Valpy*. [PARKE, B.—A mining concern is a trading

concern.] The business of it is carried on quite differently from that of an ordinary trading firm; regular calls are made as money is wanted for the purpose of the partnership, which are paid down; and the directors have only authority to manage the concern with the funds so supplied, but not to pledge the credit of individual shareholders. [PARKE, B.—The directors have authority to do all that is usual to do in the management of the mining companies.]

ALDERSON, B.—*Dickinson* v. *Valpy* was the case of a bill of exchange. The doctrine laid down in the case of *Flemyng* v. *Hector*, 2 M. & W. 172, as to the committee of a club, applies here. [LORD ABINGER, C. B.—A club is not a partnership for acquiring profits. The making of calls is quite consistent with a dealing on credit; the calls may not be demanded until the expiration of the credit.] If the credit of the shareholders may be pledged at all why may it not by the drawing of a bill as well as otherwise? [PARKE, B.—It may, where the drawing of bills is necessary or usual in carrying on the concern. You do not prove any engagement whereby it was stipulated that the directors should have only the limited authority you contend for; and the question is, whether there was not evidence to go to the jury, that the defendant gave them a more extended authority, viz.: to do all that directors of a mining company usually do for carrying on the concern. In *Flemyng* v. *Hector*, the rules of the club were proved, which showed that the authority of the directors was expressly limited. If the real nature of the transaction here was that the directors were only to manage a ready money fund, and you had made that out, the case would be different. It is submitted that the case is so as it stands. Here money was furnished in the first instance for carrying on the partnership. It is a question of law for this court whether the legal inference of authority, which the plaintiff is to make out, has been established.

LORD ABINGER, C. B.—With regard to the first ground of objection, if it had been shown that the defendant was ignorant of the fact that no more than 2,000 shares had been subscribed for, and that the concern was going on upon that footing, that would have been a good ground of defense to this action. But the question is whether the defendant's letters

did not furnish evidence to go to the jury that he was cognizant of its being carried on with a smaller amount of capital than was originally intended, and I can not say that they did not. As to the second ground, it is said that a mining company which, as was decided in *Dickinson* v. *Valpy*, is not necessarily formed with the power to pledge the credit of individual members by the drawing of bills, is also not formed with power to bind each other by dealing on credit; but these are two very different propositions. Whether the directors have such a power must depend on the general nature of the concern; it is a matter for the jury to decide upon unless the party gives evidence to show that their authority was expressly limited, and if it had been left to the jury in this case I think they would not have had much difficulty in saying that it is in the general nature of mining concerns to deal on credit for the purpose of carrying on their business. I think, therefore, the defendant has not raised a sufficient foundation to support the second objection. Being a shareholder it was competent to him to have produced the deed of settlement whereby the members were mutually bound, if it were material to his defense. I should have left it to the jury to judge for themselves whether such companies do not ordinarily deal on credit; if they do the shareholders are liable, unless by some evidence the party shows that in the particular case he is not liable.

PARKE, B.--No doubt the plaintiff is bound to make out his case; the only question is whether he has not here proved a *prima facie* case; if he has, the jury had a right to consider it, no answer being given on the part of the defendant. The sole question was whether there was evidence to go to the jury that the defendant gave authority to the directors to pledge his credit to the plaintiff. If the case had stood merely on the fact of his being a shareholder I should have thought it was not sufficient. But his letters, which were put in, showed, first, that he knew the directors were acting in the management of the partnership, and secondly, that he was taking a personal interest in the concern; and they were evidence for the jury that he authorized the directors to do what they did for his benefit. It is said that he was deceived as to the amount of capital; but whether he knew the amount actu-

ally subscribed or not, there was proof that he authorized the directors to proceed in the management of the concern. Either he knew it, or, not knowing it, chose to authorize the directors to proceed. No point was made at the trial that this was such a partnership as could not deal on credit; if it had, the plaintiff would probably have supplied evidence on that point, and a Cornish jury would probably have said it was the constant practice to purchase materials for mines on credit; at all events the objection was not taken. There was, therefore, a sufficient *prima facie* case for the jury. If the defendant had shown that by this particular contract the directors were only to deal with the actual fund put into their hands, and that they had no power to pledge the credit of the shareholders, that would have been a defense, because the plaintiff has not trusted to any representation of the defendant, or bargained personally with him. But the sole question being whether there was a *prima facie* case for the jury, I think the two letters of the defendant, and the fact of his being a shareholder, in the absence of proof of any limited agreement on his part, constituted such *prima facie* case, and therefore there ought to be a rule.

ALDERSON, B., concurred.

ROLFE, B.—I am of the same opinion. The goods supplied by the plaintiff were of daily use in the mine; they were habitually furnished, to the amount of £820; the accounts were regularly sent up to town and audited, and this was only the balance of the last invoice on the books. It is clear what was the usual mode of dealing here, and if it had been put to the jury, there can be no doubt what their finding would have been.

Rule refused.

RALPH v. HARVEY. RICHARDS v. HARVEY.

(1 Q. B. 845. Queen's Bench, 1841.)

[1] **Admissions in proof of partnership.** When a defendant is charged in debt as a member of a mining company, but is not shown to have contracted such debt personally, nor to have represented himself to the plaintiff as a partner, the fact of his having been partner may nevertheless be shown by evidence, short of strict proof that he signed the deed of partnership or was legally interested in the mine. Admissions made by him before or after the debt was incurred may be evidence for this purpose.

Ralph v. *Harvey* was an action of debt for work and labor; plea, *nunquam indebitatus*. The cause was tried April 13, 1841, at the Guildhall, Devonport, before the deputy sheriff to the sheriff of Devon. It appeared that the work had been performed at a mine held by a mining company; and the plaintiff's case was, that the defendant had become liable as a partner. The work was done in the first four months of 1840. It was not proved that the defendant had personally contracted with or employed the plaintiff, or had led plaintiff to suppose him a partner in the mine; nor was evidence given of any instrument of partnership; but the plaintiff endeavored to show that defendant was in fact a partner, by admissions in conversation. The defendant was stated to have said after the work in question had been done, and the mine had stopped, that he held one hundred shares; that he would see the manager, and that arrangements would be made for payment. *Vice* v. *Lady Anson*, 7 B. & C. 409; S. C. at *nisi prius* Moo. & M. 96, was cited for the defendant, and *Tredwen* v. *Bourne*, 6 M. & W. 461, for the plaintiff. Some evidence was given for the defendant, to show that he had never actually become entitled to shares in the mine. The deputy sheriff told the jury that *Vice* v. *Lady Anson* was still law, and not overruled by *Tredwen* v. *Bourne*. That no deed of copartnership being proved by the plaintiff, there was no copartnership, and very meager evidence indeed, beyond admissions, of the defendant being a shareholder. Verdict for defendant.

[1] *Tredwen* v. *Bourne*, 11 M. R. 268; *Bond* v. *Merriell*, 9 M. R. 664; *Reynolds* v. *Kay*, 9 B. & C. 356.

In Easter term last, a rule *nisi* was obtained for a new trial, on an affidavit by the attorney who had acted as the plaintiff's advocate, stating the above direction of the deputy sheriff. An affidavit was made in opposition to the rule, by the agent who had attended for the defendant, stating the direction to have been, that if defendant was a shareholder before or at the time when the work was done, he was liable, or if he had held himself out to the world as such; that the jury had to consider whether he was a shareholder or not; that the evidence to prove him a shareholder was extremely meager, and the deputy sheriff did not think the admissions they had heard, to the two or three persons who had been examined, were to be taken as evidence sufficient to prove defendant a shareholder; and that he considered the case of *Vice* v. *Lady Anson*, still to be law. The deputy sheriff made no statement in his notes as to the terms of his summing up.

Richards v. *Harvey* was an action of debt against the same defendant, for work and labor at the same time. Plea, *nunquam indebitatus*. The cause was tried before the same deputy sheriff, on February 4, 1841, and was in all material respects the same as *Ralph* v. *Harvey*. Admissions after the mine had stopped were proved to the same effect as in that case. No witness was called for the defendant. Verdict for defendant. A rule *nisi* was obtained for a new trial in last Easter term. An affidavit in support of the rule (sworn by the attorney who acted as the plaintiff's advocate) stated that the deputy sheriff summed up the case and directed the jury, upon the authority of *Vice* v. *Lady Anson*, that there was no evidence to show that the defendant was a shareholder; and he held that if the admissions had been made before the mine stopped, and at a time when it was working, the plaintiff could have recovered, but, as they were made after the mine had stopped, they had no weight. The affidavit, in opposition to the rule (sworn by the agent who had attended for the defendant), stated that according to the deponent's belief the deputy sheriff had not said that there was no evidence of defendant being a shareholder, but had left it to the jury to decide whether or not he was a shareholder, or had held himself out to the world as such, saying that if he had done so while the mine was working he must be presumed to have had

sufficient interest to make him a partner; and that after reading the evidence, the deputy sheriff told the jury that, if the defendant had given any authority or direction, he should have recommended them to find a verdict for the plaintiff, but as it was, he left it in their hands. The deputy sheriff, in his notes, made no statement as to his summing up.

SIR F. POLLOCK now showed cause against the two rules.— *Vice* v. *Lady Anson*, if it is still to be considered law, establishes this, that in actions against persons charged as members of mining companies, for work done, etc., on the common account, if there be no personal contract shown between the plaintiff and defendant, it must be proved by strict evidence that the defendant was a partner and so liable; and mere loose admissions are not equivalent to such evidence. The declarations in these cases, at any rate, were capable of explanation and not conclusive. As to the alleged misdirection in *Richards* v. *Harvey*, the affidavits differ, and the case appears to have been left in the hands of the jury.

ERLE and BUTT, *contra*.— *Tredwen* v. *Bourne* shows that the proof of liability by admissions is not so strictly excluded as the defendant in this case would infer from the judgment in *Vice* v. *Lady Anson*. If that case decides that where the defendant has not personally contracted, or held himself out as a partner, nothing can make him liable but proof of a regular legal title, the opinions just now delivered (June 3, 1841) by the court of common pleas, in *Steigenberger* v. *Carr*, 3 Scott's New Rep. 466, contradict it. In *Vice* v. *Lady Anson* such a doctrine was not necessary to the decision, and was less strongly laid down in this court than at *nisi prius*. The words of the summing up in *Ralph* v. *Harvey*, that "No deed of copartnership being proved by the plaintiff there was no copartnership, and very meager evidence indeed, beyond admissions, of the defendant being a shareholder," must have led the jury to suppose that the admissions were to be left out of consideration; but they were evidence for the jury, as much as the letters in *Tredwen* v. *Bourne*. Nor was the direction accurate as to the evidence of copartnership. In *Rich-*

ards v. *Harvey* the summing up had the additional defect of leading the jury to suppose that admissions could be of no avail if made after the work was done. The affidavits differ; but this appears, in substance, to have been the direction. [LORD DENMAN, C. J.—It is not satisfactory to have the statement of the advocates on this point; we should have that of the judge. SIR F. POLLOCK.—It would be desirable that a rule should be made to that effect. LORD DENMAN, C. J.—I thought it was a rule. SIR F. POLLOCK.—It has perhaps been thought that an assessor, in making such a statement, would be assuming too much the province of a superior judge. LORD DENMAN, C. J.—Not at all.] Admissions after the work was done would throw light on the defendant's conduct or expressions while it was proceeding.

LORD DENMAN, C. J.—The rule must be absolute. The deputy sheriff laid too much stress on the necessity of proving a partnership deed. Without that proof it might have been shown that the defendant had made such declarations as would render him liable. And, in *Richards* v. *Harvey*, it was a mistake to say that the declarations could not affect the defendant unless they had been made while the work was proceeding; though, if they had been made then, their effect might have been stronger. But, if uttered at any time, they might be evidence for the jury.

PATTESON, J.—I am of the same opinion. If the admission after the work was done, in *Richards* v. *Harvey*, had amounted to no more than that the defendant was then a shareholder, and the deputy sheriff had pointed that out to the jury, the case would have been different.

WILLIAMS and COLERIDGE, JJ., concurred.

Rules absolute.

FOX v. FRITH ET AL.

(1 Carrington & Marshman, 502; 10 M. & W. 131. Exchequer of Pleas, 1842.)

Note reciting contract annexed—No contract found. In an action on a promissory note, the note purported to be "For value received in Pennance shares, pursuant to annexed contract." No contract was in fact annexed. *Held*, that this special description of the consideration for the note did not render it incumbent on the plaintiff to put in any contract or other document besides the note itself, in order to establish his case.

Suit on company note by holder of company scrip. A plaintiff who is a holder of scrip, but not a registered shareholder in a mining company, has but an inchoate right of partnership in the company, and not a perfect right, and is not thereby disqualified from bringing suit upon a note of the company.

Assumpsit on a promissory note for £1,385. The note was made by the defendants, and was payable to the plaintiff, and in these words:

"£1,385. LONDON, 17th Aug., 1839.

"We jointly promise to pay J. Fox, the sum of £1,385, on the 1st day of August, 1841, for value received in Pennance shares, pursuant to annexed contract.

"(Signed), Frith—and the other partners of the Western Mining Association."

No contract was in fact annexed.

Plea, that the defendants did not make the note; with a special plea that the plaintiff was a partner with the defendants in the same transaction, etc.

The making of the note was proved by the plaintiff.

CROWDER and M. SMITH, for the defendants, submitted that the plaintiff was further bound to put in the contract referred to in the note; for it might be that such instrument, on inspection, would be found to qualify the note, and to show that in law it was not a promi sory note, but, on the contrary, that the two documen s taken together amounted only to an agreement between the parties, and required that the agreement should be declared on specially.

ERSKINE, J.

The objection taken by the defendants is, not that the note can not be read, but that the contract mentioned in it ought also to be produced and proved as part of the plaintiff's case, and that in default of such proof I ought to direct a nonsuit. But I am of opinion that it is not necessary for the plaintiff to produce the contract. The words "for value received in Pennance shares, pursuant to annexed contract," are nothing more than a statement of the consideration for the note; that consideration need not be proved any more than in the common cases of promissory notes, where the description of the consideration is value received in coals, value received as per bill delivered, or value received in any other way.

Verdict for the plaintiff.

Afterward the court, having been moved on the point (10 M. & W. 131), as set out in the plea, that the plaintiff himself was a shareholder with the defendants in the mining company, they held that the plaintiff, who was only a holder of script, and not a registered shareholder, had but an inchoate right of partnership in the company, and not a perfect right. That the note had not been made by the defendants as directors, nor had the plaintiff taken it with any view of depending upon his right in equity against the makers of it, and therefore,

Defendants' rule discharged.

RICKETTS ET AL. V. BENNETT ET AL.

(4 Common Bench, 686. Common Pleas, 1847.)

[1] **Managing adventurer no power to borrow on firm credit.** One of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body for money borrowed for the concern. And the fact of his having the general management of the mine makes no difference, in the absence of circumstances from which an implied authority for that purpose can be inferred.

Assumpsit, for money lent, money paid, work and labor, commission, interest, and money due upon an account stated. Plea, non-assumpsit.

[1] *Jones* v. *Clark*, 11 M. R. 473.

The cause was tried before PLATT, B., at the last summer assizes for Cornwall. The facts were as follows: The plaintiffs were bankers at Penzance. The defendants were two of the co-adventurers in a mine called The Wheal Providence. The mine, which, it appeared, was carried on upon the cost-book principle, was divided into one hundred and twenty-eight shares, of about £15 each. Ninety-nine of these shares were possessed by one Alexander Robinson and his son, F. T. Robinson. The defendant Bennett held four shares, and Field five and a half, both of them having become interested in the concern about June, 1844. Alexander Robinson, who acted as manager of the mine, opened an account with the plaintiffs in September, 1844, in the names of "The Wheal Providence Adventurers," the first item in which account was a sum of £280, borrowed from the plaintiffs for the purpose of paying a debt due from F. T. Robinson to the Helston bank. Alexander Robinson continued to borrow money from the plaintiffs upon the ore-notes of the mine, paying interest for a short time at £4 per cent., and afterward at £5 per cent., until December, 1845, when the account closed with a balance due to the bank of £3,668, to recover which this action was brought. The money, except in a few instances, was drawn for by checks, signed "For The Wheal Providence Adventurers. Alexander Robinson." The rest were signed by F. T. Robinson, who was purser of the mine.

Alexander Robinson, who was called as a witness for the plaintiffs, admitted that he had no express authority to borrow money on account of the mine, and that the defendants had no notice that he had done so; but he stated that nearly all the money he obtained was expended by him for the purposes of the concern. He further stated that both the defendants from time to time attended at the mine, and that the pass-book was kept at the counting house, but that he could not say that either of the defendants had ever seen it.

Within a fortnight after the account with the plaintiffs was first opened, Alexander Robinson obtained an advance of money from the plaintiffs for the express purpose of making a dividend. The defendants received this, and subsequently two other dividends at the banking house of Messrs. Glyn & Co., in London, having no knowledge that the money had

been borrowed for the purpose. The first intimation they had of the fact was the demand made upon them for the balance of the account in December, 1845, when they at once repudiated it.

No evidence was offered on the part of the defendants, but it was insisted that the mere relation of co-adventurer in a mine did not give authority to the manager to pledge the credit of the whole body for money borrowed.

The learned judge told the jury that generally speaking one partner in a mining concern has no authority to bind his co-adventurers for money borrowed, but that such an authority may be inferred from the surrounding circumstances; and he left it to them to say whether, upon the facts proved, they could infer that Robinson, the manager, had borrowed the money in question with the assent of the defendants.

The jury having returned a verdict for the defendants, CROWDER, in Michaelmas term last, obtained a rule *nisi* for a new trial, on the grounds of misdirection and that the verdict was against evidence.

WILDE, C. J., now delivered the judgment of the court.

This was a motion for a new trial, on the ground of misdirection, and that the verdict was against evidence. The facts were shortly these: One Alexander Robinson, in his own name and that of his son, F. T. Robinson, purchased a mine in Cornwall, named The Wheal Providence, for a sum of £1,500, calling their interest that of holders of one hundred shares of £15 each. The defendants also appeared to be owners of a small number of shares in the concern, four or five each; but the evidence is silent as to the period at which they first became possessed of these shares. Alexander Robinson (his son acting as purser) assumed the management of the mine, and continued to manage it down to the time of the closing of the account in respect of which this action arises. In September, 1844, Alexander Robinson, having then a private account with the bank of the plaintiffs, Messrs. Ricketts & Co. of Penzance, and also other accounts for other mines, opened an account with them in the name of The Wheal Providence Adventurers; the first item being a sum of

£280 borrowed from the plaintiffs for the purpose of paying a private debt of F. T. Robinson to the Helston bank. At the time of opening this account, Alexander Robinson informed the manager of the bank that considerable accommodation would be wanted; and it was agreed between them that the bank should discount the ore-notes of the mine at £4 per cent. which was shortly afterward increased to £5 per cent. The account went on in this way for a considerable time, Alexander Robinson drawing money by checks signed, "For The Wheal Providence Adventurers. A. Robinson." Within a fortnight after the opening of the account, Alexander Robinson (holding, together with his son, as before observed, ninety-nine or one hundred shares in the concern) applied for an advance of money for the purpose of making a dividend, which, he informs the bank, he deems expedient. He did not, however, at that time draw for the amount of his own and his son's dividends, but he did so shortly afterward, the bank paying his drafts without distinguishing on what account the money was drawn. Having thus obtained advances from the bank, part of which was applied to the purposes of the mine, and part to the private purposes of the Robinsons, in the result, the account, toward the close of 1845, became overdrawn to the extent of £3,668; and the two defendants being found to be shareholders this action was brought against them to recover that sum. The defendants had no notice that the dividends (three having been made in the whole) were paid out of borrowed money, nor had they any notice of the existence of the account with the plaintiffs until the balance was demanded of them, and then they at once repudiated it.

The case on the part of the plaintiffs was not very distinctly put, either at the trial or upon the argument of this rule. It did not very clearly appear whether they insisted that the defendants were liable simply by reason of their being shareholders, or as being partners with the manager of the mine. In fact, the only difficulty in the case arises from the circumstance of our minds not having been sufficiently invited to the distinction.

The points urged on the argument were, first, misdirection; secondly, miscarriage of the jury.

The objection taken to the ruling of my brother Platt was,

that he told the jury that the defendants were not liable *simpliciter*, for money borrowed by a co-adventurer. In other words, that the mere fact of the defendants being shareholders in the mine did not give to a co-adventurer authority to pledge the credit of the defendants for money borrowed. The learned baron, however, adds, that such an authority may be implied from the surrounding circumstances; and he leaves it to the jury to say whether, the defendants being co-adventurers with Alexander Robinson, and he being manager, and having opened the account in the name of the concern, regard being had to all the evidence given on the part of the plaintiffs, any implication of authority necessarily arose for the borrowing of moneys essential to the well conducting of the adventure. The charge of misdirection applies itself only to the first part. What authority has been presented to the court of holding that one who becomes party to an adventure of this sort thereby gives authority to his co-adventurers to pledge his credit? In the case of ordinary trading partnerships, each member of the firm has equal authority with his copartners to deal according to the usual course of business. Hence it is that there is an implied authority in each, to a very considerable extent, to bind the firm by accepting bills and borrowing money. Is that the case with reference to mines? By no means; it is well known that *all* the co-adventurers in a mine do not assume an equal degree of authority, but that the management is invariably intrusted to certain of them. If it were held, as a principle of law, that any one of the co-adventurers, independently of management, had an implied authority to pledge the credit of the whole for a loan of money, would not that be inconsistent with the known usage in such cases? Who, if that were the law, would become party to such a scheme? If there be any such implied authority in one of the co-adventurers to bind the whole, such authority must result from the fact of his having the management of the concern intrusted to him, and not from the mere circumstance of his being one of the co-adventurers. Many of the remarks made in the course of the argument as to the supposed analogy between an association of this sort and an ordinary trading partnership, were founded upon an incorrect view of the subject. Though they have many

points of resemblance there are also many in which they very materially differ. The partners in an ordinary trading concern are supposed all to be equally in the management; it is not so, however, in the case of a mining adventure. The course that many judges have thought to be the right course was pursued here; for the learned baron told the jury that the circumstance of their being co-adventurers in the mine did not, of itself, authorize Robinson to borrow money upon the credit of the defendants; and he left it to them to say whether, regard being had to the nature of the concern and the course of dealing of the parties, Robinson had any implied authority for that purpose. Robinson's evidence distinctly negatived his having any express authority.

Many authorities have been referred to; but it is difficult to understand whether they were relied upon in support of the objection to the ruling, or as impeaching the propriety of the verdict.

In *Dickinson* v. *Valpy*, 10 B. & C. 128, 5 M. & R. 126, a case which is deeply impressed upon my mind, from the circumstance of my having been counsel in the cause, and from its being one of the earliest cases in which I was concerned at the bar, one of the questions was, whether a co-adventurer in a mine was bound by the acceptance of bills by the directors? How was that question dealt with by the court? Lord Tenterden says: "I am of opinion that the mere circumstance of the defendant having become a shareholder in a mining company does not, in point of law, make him answerable for bills drawn or accepted by those who took upon themselves to manage the concern." Bayley, J., says: "In order to establish his liability, it ought to have been made out affirmatively, on the part of the plaintiff, that this was a company in which the directors were authorized to bind the other members by drawing and accepting bills. Now, upon that point, the only question which could be submitted to the jury was, whether companies instituted for similar purposes had constantly been in the habit of drawing and accepting bills; or whether it was absolutely necessary for the purpose of carrying on the concern that there should have been such a power. There was no evidence to warrant the judge in leaving those questions to the jury. First, there was no evidence for them that such

a power was usually vested in the directors of other companies, or that it was necessary for the purpose of carrying on such a concern. I think that such a power is not necessary for that purpose." And he afterward adds: "The directors may bind themselves personally, and pledge their own responsibility, but not that of the other members." Littledale, J., says: "In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company." And the judgment of Park, J., is much to the same effect. The result of that case is, that, in an association for the working of mines, only such authority in one of the co-adventurers to pledge the credit of the rest will be implied by law, as is usual and necessary for the working of mines; and there is nothing in that case to impeach either the ruling or the verdict upon this occasion.

The next case is *Tredwen* v. *Bourne*, 6 M. & W. 461, where goods had been supplied on credit for the use of the mine, by order of the directors. The defendants there appeared to have interfered with the management of the concern, in such a manner as to show that they were cognizant of the fact of the business of the mines being carried on upon credit; and, therefore, it was left to the jury, not simply whether the defendants were liable by reason of their having been co-adventurers, but also whether they knew of the concern being carried on by the directors and those employed by them, in the manner it was; in which case, the jury were told, the defendants were liable; and upon the jury finding this question in the affirmative, they were held to be liable. I observe that Mr. Crowder, in the course of the argument in that case, states something that does not appear to have been in evidence here, but which I believe to be quite correct as regards mines that are worked upon what is called the cost-book principle: "The business of a mine is carried on quite differently from that of an ordinary trading firm. Regular calls are made, as money is wanted for the purpose of the partnership, which are paid down; and the directors have

only authority to manage the concern with the funds so supplied, but not to pledge the credit of individual shareholders." Parke B., in the course of the argument, says: "The directors have authority to do all that it is usual to do in the management of mining companies." There is nothing there that is inconsistent with the position that the degree of authority is to be judged of by the nature of the concern, and the mode in which it has been carried on. In delivering his judgment, the same learned judge says: "The sole question was, whether there was evidence to go to the jury that the defendant gave authority to the directors to pledge his credit to the plaintiff. If the case had stood merely on the fact of his being a shareholder, I should have thought it was not sufficient." That is just what was said by my brother Platt on this occasion. As far as that case goes, therefore, it is a distinct authority in support of the present verdict.

The next case it is important to notice, is *Hawtayne* v. *Bourne*, 7 M. & W. 595. That was an action against a co-adventurer in a mine, to recover a sum of money borrowed by the agent of the mine. It is an extremely important case, as showing in what manner and to what extent partners in mining adventures are held liable for contracts entered into on behalf of the concern. The debt, it appeared, was *bona fide* incurred in raising money for the payment of wages to the miners. Proceedings had been taken to enforce payment and the property of the mine had been seized and was about to be sold. The consequences of stopping the works would have been very serious. The mine would, in all probability, have been filled with water, and much difficulty and expense would have been incurred on recommencing the working. In one sense, therefore, there clearly was an urgent necessity for paying these debts. Looking at the necessities of the moment, my brother Maule told the jury that, although under ordinary circumstances an agent could not, without express authority, borrow money in the name of his principal, so as to bind him, yet, if it became necessary to raise money in order to preserve the property of the principal, the law would imply an authority in the agent to do so, to the extent of that necessity; and he left it to them to say whether the pressure on the concern

was such as to render the advance of the money a case of such necessity. The jury found that it was. The court of exchequer, however, granted a new trial, holding that this was not within the ordinary authority of an agent, and that such authority is to be measured by the ordinary necessities of the concern, and not by sudden and extraordinary occasions. There is nothing, therefore, in that case, to sanction the idea that any authority to pledge the credit o f the concern in this way is to be inferred from the mere circu mstance of being a co-adventurer.

The next case is *Hawken* v. *Bourne*, 8 M. & W. 703. It had been thrown out by some of the judges in *Tredwen* v. *Bourne*, that if there was any express restriction or limitation of the authority of the directors to contract debts that should have been shown, and that, apparently, gave rise to *Hawken* v. *Bourne*, where the existence of such a limitation of authority was proved. As soon as the attention of the judges was called to it as a point in judgment, they felt that if the authority to be implied from the nature of the concern, and the usual mode of conducting such adventures, is to be at all restricted by the agreement of the partners, the world, or those who deal with the concern, should have notice of such restriction; therefore when the prospectus limiting the authority of the directors was put in, the court said that could not affect the plaintiff's rights, because he must be assumed to have dealt with the directors upon the supposition that they were acting under the authority usual in cases of the kind. That is a distinct recognition of the principle upon which the summing up of this case proceeded.

No evidence was given here of any usage as to borrowing of money by mining adventurers, nor any evidence of necessity. But it appeared that the defendants never in any way interfered in the management of the concern, and it was sought to charge them simply on the ground that they were co-adventurers with the Robinsons. No question went to the jury as to whether the plaintiffs had notice of Robinson's misapplication of part of the money. I incline to think there was cogent evidence that the plaintiffs dealt with the Robinsons only. But that point does not now arise. I assume that the money was advanced upon the credit of the mine, and that

the plaintiffs had no notice that it was applied otherwise than to the purposes of the mine. But, upon the facts reported, it appears to us that there was no evidence to warrant the jury in coming to any other conclusion then they have done. It was left to them broadly and correctly that the defendants were not liable simply because they were co-adventurers, but that they might imply an authority in Alexander Robinson to pledge the credit of the defendants for what was necessary to the successful management of the mine, and was usual. The jury must, therefore, be taken to have found that the borrowing of money was not necessary for carrying on the business of the mine, and that it was not usual.

We are therefore of opinion that the direction of the learned baron was correct, and that the jury came to a proper conclusion upon the evidence that was before them, and, consequently, that this rule must be discharged.

Rule discharged.

BURGAN v. LYELL ET AL.

(2 Michigan, 102. Supreme Court, 1851.)

[1] **General power of partner—Dormant partners.** Each member of a mining copartnership has power to bind the company by any contract within the scope of the partnership, and is a general agent of his copartners for such purpose. The fact that some of the partners were dormant, or the fact of their subsequent dissent, does not affect the joint liability.

[2] **Restrictions inter sese.** A special limitation of the powers of the partners contained in the articles of copartnership does not affect the power of each partner to contract and bind his copartner, except as against parties having notice of such limitation.

Silent dissolution as affecting liability. A dissolution by one of the partners silently withdrawing or assigning his stock to another, can not relieve such partner from liability for work done before, or debts contracted after thus silently withdrawing or assigning.

Case reserved for the opinion of this court.

The defendants were members of the United States Mining Company.

[1] *Tredwen* v. *Bourne*, 11 M. R. 268.

[2] *Nolan* v. *Lovelock*, 9 M. R. 360; *Hawken* v. *Bourne*, 8 M. & W. 703.

BACUS & HARBAUGH, for plaintiff.

A. DAVIDSON, for defendants.

PRATT, J.

This is an action of assumpsit, brought by the plaintiff in the Wayne County Court, for work and labor claimed to have been performed for the defendants, in their mining business.

The cause was submitted to the court below on a written statement, in which it is admitted that the defendants impleaded in this suit include all the members of the company; that they all signed the original articles of copartnership and prosecuted the business of mining under them.

These concessions thus made constitute conclusive evidence as against the defendants of a partnership in fact, in which they are all, as partners, engaged in the business of mining: 2 Greenleaf Ev., § 484. It further appears, from the case submitted, that Andrew Harvie, a member and one of the managers of the company, employed the plaintiff to perform the work in question. But whether his powers, as one of the managers of the company, were general, or special and limited, does not appear, nor is it material to a judicial determination of this cause as every member in legal contemplation, without any special powers being conferred upon him by the articles of copartnership, is not only a principal of the firm, but a general agent for all the copartners in the transaction of their legitimate company business, (Story on Part. 1; Harrington Ch. R. 172,) each member being vested with power which enables him to act at once as principal; and all are regarded as being present and sanctioning the engagements and contracts which they may singly enter into within the scope of their partnership matters: Story on Part., 158–9. Harvie then, being one of the partners, was vested with the right of contracting with the plaintiff, and any work performed by him for the company, under the contract, would legally bind all of the partners for the payment of it. Although Harvie, as a single member, was inhibited from making such a contract by some express provision of the articles of copartnership, still the rights of third persons to whom such provision was unknown would not be thereby affected, nor would it tend in the least to bar a third person, who had by the procurement of a

single member, without notice, rendered services for the company, in recovering therefor in a suit against all: 2 Greenleaf Ev. § 481; Story on Part. 193. The plaintiff, by the procurement of Harvie, as appears by the case, labored for the company in their mining operations nine months and two days at $18 per month. In this labor of the plaintiff all the partners were interested and in judgment of law all are presumed to have been cognizant of its performance and to have derived, at least, some benefit from it; hence all are, as they should be, by every principle of justice, held equally responsible to the plaintiff for the payment of the services thus rendered. And as it regards their joint liability, it is a matter of no legal moment whether some of the partners were dormant in fact, or whether they subsequently assented to or dissented from the proceedings of those with whom they had intrusted the management of their company business; they would, nevertheless, be jointly liable to the plaintiff for his work.

After the services were rendered, the plaintiff, as appears by the case, made out an account therefor against the company, the balance of which, after deducting some small sums which had been paid and credited, amounted to $147.43, on which John Greenfield, their superintending agent of the hands employed on the mining location, certified to John Winder, a member and also one of the managers of the company, that the account was correct, and that the balance thereof was due to the plaintiff. Winder afterward, on presentation of the account and certificate to him, paid the plaintiff $40, which was indorsed thereon.

It is a well settled principle of law that "the acknowledgment by one partner, during the continuance of the partnership, of a debt as due by the partnership, will amount to a promise binding on the firm." The certificate of the superintending agent and the recognition of the account by a member and one of the managers of the company, constitute sufficient evidence of such acknowledgment. "And so a part payment of a debt of a firm by one partner, during the continuance of the partnership, will not only extinguish *pro tanto* the partnership debt, but will operate as an admission of the existence of the residue of the debt, binding on all the partners." Story on Partnership, p. 160.

These are rules of law about which there has never been any disagreement, either by legal authors or courts of last resort, and by them all the members of this company are equally liable to the plaintiff for the payment of the balance due him on the account.

The question "whether a member who had sold out his shares in the company stock would be relieved from liability, without notice before the w rk was done, or from the payment of debts created subsequent to such sale," propounded to the court for decision, is not involved in the case as it is drawn up and submitted; the answ r is, that each member of the partnership will continue liable to third persons for any debts or liabilities incurred in the transaction of their legitimate company business, until a dissolution of the copartnership and notice thereof, (Story on Part. § 334, '5 and '6, together with cases therein noted,) and that a dissolution by one of the partners silently withdrawing, or assigning his interest in the company stock to another, can not legally have the effect to relieve such partner from liability for work done before, or debts contracted after thus silently withdrawing or assigning.

The opinion, therefore, of this court is that the plaintiff is entitled to judgment for the balance of his account and interest from the time of its liquidation.

FLETCHER & BROS. v. HAWKINS.

(2 Rhode Island, 330. Supreme Court, 1852.)

[1] **Prospecting contract—Gold dust—Distinction between "profits" and "returns."** A prospecting party, organized in Rhode Island to mine in California, took ship but dissolved by common consent before they reached port, divided the outfit among them, and resolved that each would work for the man who had sent him but that they would not operate under any company organization. Hawkins was the party who had outfitted one Andrews. Andrews proceeded to mine and remitted to Hawkins 18 oz. of gold dust. In the meantime Hawkins had sold and guaranteed to plaintiffs a fourth interest in the "profits" of the adventure, and he now refused to divide the gold dust. *Held*, that this gold dust was merely a payment on account of an equity between Hawkins and Andrews, but that, as the arrangement out of which

[1] Net profits defined: *Binney* v. *Ince Hall Co.*, 11 M. R. 410.

Hawkins had guaranteed plaintiffs an interest in the "profits" had dissolved and had never realized any "profits," that there was no liability or accounting due from the defendant, Hawkins, to the plaintiffs.

Covenant upon the following agreement:

"The said Richard B. Hawkins doth hereby covenant and agree, for the consideration hereinafter mentioned, that he will send out in the Narragansett Trading and Mining Association one man, holding one share in said association, and in consideration of the sum of three hundred dollars in hand paid to said Richard B. Hawkins by the said Fletcher & Brothers, he, the said Richard B. Hawkins, will guarantee unto the said Fletcher & Brothers one fourth part of the profits of said one share of said association, when the dividend shall be made according to the form of their copartnership, provided, however, that if the person holding the said share in said association shall, by his acts, forfeit said share according to their form of copartnership, then said Hawkins shall not be bound to pay said profits, and this agreement shall be null and void."

The constitution of the Narragansett Trading and Mining Association declared that it was a joint stock company formed "for the purpose of buying or chartering a ship and freighting her, as the directors should see fit, for the coast of California, and engaging in such trading and mining operations as should be deemed most advisable." Every stockholder was to pay in the sum of three hundred dollars, and, after the sailing of the vessel, to devote his time and attention wholly to the interests of the company, and use his best skill and judgment in promoting the profits of the business, and during the continuance of the agreement neither to engage in any speculation on his own separate account, or to be interested in any other business than that of the association; his interest in the association was to be forfeited by a withdrawal, unless upon certain prescribed terms. By the eighth section it was provided: "A statement of the affairs of the association shall be made in one year from the date of this instrument, and a division of the profits, over and above the original capital invested, shall then be made *pro rata* to each and every member of the association." No time was prescribed for the duration of the company.

According to the agreement between the plaintiffs and defendant, the defendant sent out Asa A. Andrews, holding one share in said association, and previous to the sailing thereof said Andrews executed to the defendant a transfer of his interest in the association, and also one half part of all his proportion and interest in and to the profits which should accrue to said association during the existence thereof, and to which he should be entitled agreeably to the constitution and by-laws.

On the voyage to San Francisco the association was dissolved by the unanimous consent of the members, and on their arrival at that port the property was sold and divided among the members according to their shares, but upon the understanding that each man would go on and mine for him who sent him out, in the same manner and on the same terms as if the association had not been dissolved. One member refused to accede to these terms, and he received no part of his distributive share. Andrews received the proceeds of the share of the company property which he represented, amounting to about three hundred and fifty dollars, went to the mines and worked at mining, and sent home to the defendant, as his share, eighteen ounces of the dust, worth about three hundred dollars, for which the defendant receipted as follows: "Received of Asa A. Andrews eighteen ounces of gold dust, being one half the proceeds of A. A. Andrews' engagement with R. B. Hawkins for two years in California." The plaintiffs claimed one half this amount by virtue of the covenant with the defendant. A jury trial was waived and the case was submitted to the court upon the pleadings and the evidence.

TILLINGHAST and BRADLEY, for the defendant, contended that, no profits having accrued to the association according to the form of the copartnership, the plaintiffs were not entitled to any part of the proceeds remitted, which were simply repayment of the amount taken by Andrews upon the sale of the defendant's interest in the property and under the distribution made by the company.

AMES and PAYNE, contended for the plaintiffs, that all the capital of the company was intended to be consumed in getting the members to the mines and supporting them when there, and that the word "profits" in the agreement meant

returns of whatever kind; that Andrews, having received a share in the distribution of the company's property, upon condition that he would go on and complete his engagement with the defendant, was estopped from denying his liability thereon, and that the defendant, by his receipt of the proceeds in accordance with this arrangement was affected by the same estoppel.

GREENE, C. J., delivered the opinion of court. (After stating the covenant as above.)

The defendant did send out in the Narragansett Trading and Mining Association one man, Asa A. Andrews, holding one share in said association, but in the voyage to San Francisco the association was dissolved by the unanimous consent of the members, and on their arrival at that port the property of the association was sold and divided among the members according to their shares, but upon the understanding that each man would go on and mine for him who sent him out, in the same manner and on the same terms as if the association had not been dissolved. One member refused to accede to these terms and he received no part of his distributive share. Andrews received the share of the company property which he represented, went to the mines and worked at mining and sent home to the defendant, as his share, eighteen ounces of dust, worth about three hundred dollars, of which the plaintiffs claim one half as profits, in the sense of the covenant. On the 7th of February, 1849, and before sailing from Providence, Andrews received from the defendant three hundred dollars, being the amount required to be advanced for each share toward the capital stock, and assigned to the defendant all his interest in the capital stock of the association, and one half of his proportion of the property which might accrue to said association during the existence thereof, and to which he might be entitled agreeably to the constitution and by-laws of the association. These are the leading facts.

The counsel for the plaintiffs contended, that in a mining company of this sort the whole capital is contemplated by the parties to be expended in getting the miners to the mines

and supplying them with provisions and tools to mine with, and that profits, therefore, in such a company, means returns. But the constitution of the association declares it is formed for the purpose of buying or chartering a ship and freighting her as the directors shall see fit for the coast of California, and engaging in such trading and mining operations as shall be deemed most advisable; and the eighth article of the constitution provides for a division of the profits over and above the original capital invested. It is evident this article contemplates a division of profits as distinguished from capital, and a division which shall leave the capital undiminished.

And we think the agreement uses the terms in the same sense, inasmuch as it declares the profits, guaranteed to the plaintiffs, are such as shall be made according to the form of the copartnership; that is, shall be divided according to the provisions of the constitution of the association. And there is no provision in the constitution for making a division of profits except the article referred to. Besides, this is the ordinary mercantile and legal sense of the term, and the burthen is on the plaintiffs to show it was used in a different sense in this agreement. Under different circumstances, this term might very properly receive the construction contended for in the present case. But we must take the contract as the parties have made it. It may be a hard bargain on the plaintiffs, who, it seems, furnished the whole amount advanced to Andrews, and got in return no interest in the capital stock, and nothing but a guaranty of one quarter of the profits on the share when declared. They did not require of the defendant any stipulation that the company should continue to transact business for any definite period, or that they should make a dividend of profits, or that in the event of a dissolution they, the plaintiffs, should be entitled to a certain proportion of the company property, or the property which the partner should make individually on the share he should receive of the company property, or that the defendant should in any way be responsible for the conduct of the company or of any of the members thereof; all they have stipulated for is one quarter of such profits on the share, as shall be made according to the form of the copartnership.

Again, there could be no accruing of profits to the company out of company business, after the distribution of the company

property among the partners. What was company property, during the existence of the copartnership, became, by the dissolution of the one and distribution of the other, the private property of the partners, and the same of any property thereafter made upon it. Nor is this aspect of the case changed by the fact that each partner received his distributive share, upon the understanding that he was to use it for mining and account for it and the profits on it to the party at home, whom he represented. The property and profits were still private, and are not embraced by the language of the agreement.

The plaintiffs have taken the risk of what has happened, and they can not now be permitted to construe their contract as if they had provided against it.

Neither do we think that the defendant is estopped from denying that any profits have accrued in the sense of the agreement, by the fact that he has received from Andrews more than half of all his earnings at the mines.

The defendant, under the assignment to him by Andrews, became the owner of the share represented by Andrews, but entitled only to one half of the profits which might accrue to the association during the existence thereof, and to which Andrews might be entitled agreeably to the constitution and by-laws of the association.

These profits, as already stated for another purpose, are defined in the article of the constitution already referred to. No profits accrued during the existence of the association, and, therefore, there are none to divide between Andrews and the defendant under this agreement. But Andrews, having taken the proceeds of the share owned by Hawkins to his private account and used it in his private business without the consent of the defendant, is liable in equity to account to the defendant both for the capital and profits upon equitable principles, and such accounting is quite irrespective of the agreement between the plaintiffs and the defendant, and is founded on property in Hawkins.

The understanding on which Andrews, in common with the other partners, received the share of the company property, which each represented, does not strengthen the obligation of Andrews to account. He would be equally liable without such understanding.

BREADING v. BOGGS.

(20 Pennsylvania State, 33. Supreme Court, 1852.)

[1] **Irregularities in judicial proceedings.** Irregularities and defects of form in judicial proceedings can be taken advantage of by parties or privies only; third persons have no right to interfere.

Judgment in trust for miners and small creditors. A judgment given by a firm engaged in the iron business to a trustee, for use of the hands about their works and other small home creditors, in pursuance of a bond and declaration of trust specifying the amount due each creditor named therein, is not forbidden by law, the debts being justly due and the object being to save costs.

Judgment and assignment distinguished. A judgment is not an assignment. One is the act of the party, the other the act of the law. A judgment by confession can have no tendency to defeat a statute which provides for an equal distribution among all creditors in cases of assignments; for the statute does not apply to such a case.

Error to the Common Pleas of Clarion County.

This was a feigned issue directed by the court between James E. Breading and George E. Arnold, as surviving partners, and various other creditors of Alexander & McIlroy, as plaintiffs, and John H. Boggs, as trustee of William Elliott and others, defendant.

The issue was directed in the court below to try whether the judgment to December term, 1850, in favor of *John H. Boggs, trustee*, v. *Alexander & McIlroy*, was fraudulent and void as to plaintiffs, or in violation of the provisions of the act of 17th April, 1843, and the proviso of the 4th section of the act of 16th April, 1849, in reference to assignments.

Henry Alexander and James G. McIlroy, partners, iron masters in Clarion county, confessed a judgment to Jacob Painter & Co. for the sum of $7,934.9), which was entered on the 6th December, A. D. 1850, in the Common Pleas of Clarion County. Upon this judgment a writ of *fieri facias* was issued on the 6th of December, 1850, and all the personal property of the defendants was levied upon and sold by the sheriff on the 8th of January, 1850, for the sum of $2,179. Under the same writ of *fi. fa.* the defendants, Alexander &

[1] *Gartside* v. *Outley*, 10 M. R. 566.

McIlroy, having waived inquisition, the sheriff levied upon and sold, on the 4th day of February, 1851, the real estate of the said partners for the sum of $11,300.

These sums, amounting to $13.479, were brought into court for distribution, and so much of the fund as was applicable to the judgments *prior* to that of the plaintiffs in the issue was distributed by the order of the court, the balance remaining in court to await the decision of the feigned issue.

The judgment in favor of John H. Boggs was entered on the first day of January, 1851. The judgment in favor of Logan, Wilson & Co., who were some of the plaintiffs in the issue, was entered on the 4th January, 1851; that of Breading & Arnold, and others of the plaintiffs, were entered on 17th January, and others on the 24th January on awards of arbitrators.

The judgment in favor of Boggs was entered in pursuance of a bond of Alexander & McIlroy, dated 25th December, 1850, containing authority to confess judgment. In the bond Boggs was not called trustee, but he was so styled in the *narr.* and in the docket entry of the judgment. Before the entry of the judgment in favor of Boggs, the plaintiff in the issue had brought suits, and rules to arbitrate were entered.

A declaration of trust, dated 30th December, 1850, was executed by Alexander, McIlroy and Boggs, in which it was stated that Alexander & McIlroy were justly indebted to certain persons, who were named, exceeding fifty in number, in amounts stated, and amounting in all to about $8,074.86, which was stated in the bond as the amount of the indebtedness. It was also stated as agreed upon between the parties, that the bond in question was to be held by Boggs in trust for the creditors named in the instrument; and it was provided that if the fund were insufficient to pay the claims of all of them, each one was to receive in ratable proportion.

On the 25th of April, 1851, the bond and declaration of trust, being on the same paper, were filed in the case of Boggs. The declaration was not recorded.

In the counter statement the deposition of H. Alexander was stated, and he testified, *inter alia*, that their home creditors, including the furnace hands, farmers and others, renewed their applications for judgments or the money; that he pro-

posed to put them on an equality by giving a general judgment for the benefit of them all. He further testified that when he made the proposition he did not know whether Breading et al., and other Pittsburgh creditors whose claims had been forwarded for collection, had obtained judgments or not, but before the bond was signed he learned that judgments had not been obtained for them.

He further stated that at the time the judgment bond was signed by himself and James G. McIlroy, he did not know that Alexander & McIlroy were in insolvent circumstances, but then believed that if the property of the firm could be sold or disposed of for its real value it was sufficient to pay all their debts; and it was his opinion at that time that all their creditors were secure upon their property, and that all would eventually be paid. He further stated that the judgment bond by McIlroy and himself to John H. Boggs in trust was not given for the purpose of hindering, delaying, or defrauding the plaintiffs, James E. Breading and others, or any other of the creditors of Alexander & McIlroy, or defeating their claims, but with a view to secure the persons, in whose favor said judgment bond had been entered, their just claims, and to save costs by avoiding numerous suits or separate confession of judgments.

GALBRAITH, J., *inter alia*, charged the jury:

"The judgment of Boggs was entered on the 1st of January, 1851, and those of the plaintiffs in this issue were obtained on the 17th of January, 1851, by award of arbitrators; and they claim that the balance of the money, not distributed, should be paid and applied on their judgments, and hence have attacked the judgment of Boggs on two grounds: First, that it is fraudulent as against subsequent judgment creditors; and second, that it is in violation of the provisions of the acts of the 17th April, 1843, and the proviso of the 4th section of the act of 16th April, 1849. This is denied on the part of Boggs, who stands as trustee for some fifty-two creditors of the firm of Alexander & McIlroy, according to a declaration of trust written on the same paper with the bond; and it is said to have been executed at the same time, although bearing date five days afterward, to wit, the 30th of December, 1850. The judgment was entered up by a declaration upon

it filed the 1st of January, 1851, and the bond itself, with the declaration of trust accompanying, was filed on record on the 25th of April, 1851.

"The first branch of the issue involves the consideration and the fairness of the judgment in favor of Boggs; or in other words; whether the judgment is fraudulent and covinous in fact, whether the debts which it professes to cover are honestly due by the firm of Alexander & McIlroy to persons named in the paper attached to the bond, called the declaration of trust. This part of the issue does not seem to be insisted upon on the part of the plaintiffs." "The next branch of the issue is whether that judgment is in violation of the provisions of the acts of 1843 and 1849. This involves the legal construction of those acts of the legislature, and is more a question of law than of fact in this case.

"In order to understand properly the provisions of the act of 1849, it is necessary to keep distinctly in view the subject to which it relates, to wit, the subject of assignments for the benefit of creditors. That there is much obscurity in the proviso to this fourth section is apparent." He supposed it was "the result of the operation of more than one mind. To one the idea of preferences to creditors releasing was prominent, and the effort in the first part of the section is to avoid the effect of any condition for release; to the other that of really securing what was not in danger, that is, the lien of a *bona fide* judgment, and is contained in the form of a proviso, not really appropriate to the section in which it is inserted, but to the original law of 1843, which was evidently what was in mind of the draughtsman of that proviso. It was certainly not intended to depart from the subject-matter of the first part of the section, to wit, that of assignments for the benefit of creditors.

"Was this judgment bond then an assignment of itself? This would involve a perversion of language. By an assignment the assignor parts entirely with his dominion over the property assigned—his right to possession or control over it. In the confession of a judgment he does neither until it is taken out of his possession by an execution and sale.

"The judgment was entered on the 1st of January, 1851, in the usual way, by an attorney, in virtue of the warrant of

attorney. On the 25th of April the paper was filed, indicating the persons to whose use the moneys should be applied. The plaintiff's second point asserts that this would avoid the judgment as against the plaintiffs, whose judgment was obtained in the mean time, to wit, on the 17th of January, 1851. To this we answer in the negative, that it was not a matter of any concern to the plaintiffs, provided the debt was justly due and *bona fide*, to whose use it was marked on the docket."

"The fourth point of the plaintiffs is that the judgment is void without the assent of the persons to whose use the money was marked. To this we dissent. The express assent of the persons for whose benefit the judgment was confessed was not necessary to its validity. It being for their benefit their assent would be presumed in the absence of all evidence showing any dissent on their part."

May 3, 1852, verdict was rendered for defendant, and on May 8th, judgment entered and distribution decreed—the same to be delayed for three weeks.

Error was assigned to the charge.

J. S. McCALMONT, with whom were MYERS and SMITH, for plaintiffs in error.

SUTTON, with whom was CORBETT, for defendant.

T. WILLIAMS, also for plaintiffs.

LEWIS, J., delivered the opinion of the court.

Irregularities and defects of form in judicial proceedings can be taken advantage of by parties or privies only; third persons have no right to interfere. And where the parties to a judgment have agreed to the form in which it shall be entered, or waived irregularities in entering it, an assignee for creditors, deriving title subsequently, can not be received to make objections upon such grounds.

A judgment given by a firm engaged in the iron business to a trustee, for the use of the hands about the works, and other small home creditors, in pursuance of a bond and declaration of trust, specifying accurately the amount justly due

to each person therein named, is not forbidden by law where the debts were all justly due and the object was to save costs. On the contrary, where the debts were small in amount, and the creditors secured were fifty-two in number, as in this case, the method adopted was a benefit to all parties interested in the assets of the firm.

A judgment is not an assignment. One is the act of the party, the other the act of the law; in the one case the debtor surrenders the dominion to another, in the other he submits, without opposition, to the course prescribed by law. Where the debtor makes no assignment, neither the act of 1843 nor the proviso in the act of 1849 can have any operation in the case. The act of 1843, with an exception in favor of wages, makes provision for an equal distribution among all the creditors, in proportion to their claims. The intent to evade an equal distribution is therefore what is forbidden by the proviso in the act of 1849. But where there is no assignment there is no provision for an equal distribution, and in such case the confession of judgment can have no tendency to defeat it. Its only tendency is to change the order of preference from that which would be produced by adverse proceedings. This was the principle settled in *Worman* v. *Wolfersberger*, 7 Harris, 59, and we see no reason to depart from the doctrine of that case.

The opinion of the court below contains a sound and clear exposition of the law. The judgment on the verdict and the decree of distribution thereon, are affirmed.

Judgment and decree affirmed.

ROBERTS v. EBERHARDT.

(1 Kay, 148. High Court of Chancery, 1853.)

Want of co-operation by partner distinguished from interference—Receiver—Dissolution. Where tenants in common of a mine have been working it in partnership, or where the mine itself is the partnership property, the court will not appoint a receiver or manager at the instance of one of the partners, in a suit which does not

seek to dissolve the partnership. Nor, even in a suit to dissolve the partnership, will the court appoint a receiver on an interlocutory application, merely upon evidence that the partners do not co-operate in the management of the business; but to sustain such an application it must be shown that one partner has interfered so as to prevent the business being carried on.

Powers of managing partner. A managing partner of a mine has authority to defray all the necessary and proper expenses incidental to the beneficial working of the mine out of the joint profits derived from the sale of the minerals.

The plaintiff and defendant had been, since 1840, carrying on the business of solicitors, in partnership, under the firm of Roberts & Eberhardt, the plaintiff receiving five eighths, and the defendant three eighths of the profits. The plaintiff alleged that this partnership was in continuation of a previous partnership between himself and a gentleman named Crompton, which was conducted under written articles of partnership, by which it was, amongst other things, provided, that the said partnership should continue for twenty-one years from the commencement; but no written articles of partnership were entered into either on the original admission of the defendant as a partner, or on the retirement of Mr. Crompton.

In 1845 the plaintiff and defendant joined in purchasing one fourth share in a colliery called the Tipton colliery, and the same was conveyed to them in moieties as tenants in common.

The plaintiff and defendant advanced from time to time money out of their law partnership business, for capital and other expenditure in carrying on this colliery, in respect of their shares therein, and they subsequently purchased the other three fourths of the said Tipton colliery in equal moieties; and a considerable amount was advanced in respect of installments of the purchase moneys, and for carrying on the colliery, out of the moneys of the law partnership. The plaintiff alleged that the said colliery had since been worked by the plaintiff and defendant, as partners, in equal moieties, under the firm of "Roberts & Eberhardt," and that the accounts between the colliery and law partnerships had never been adjusted.

The law business of the said copartnership and part of the business of the colliery were conducted in offices at Stour-

bridge. Both partnerships were for some time conducted chiefly by the defendant, but the plaintiff had of late taken the sole management of the colliery. On the 17th of November, 1853, the defendant told the plaintiff that he should determine the law partnership and close the office; and immediately afterward he served the plaintiff with notice of a dissolution of the copartnership of solicitors between himself and the plaintiff, and requested the plaintiff to sign the same, which the plaintiff refused to do.

The plaintiff now filed the bill in this suit, stating the above mentioned facts, and that the defendant refused to communicate with the plaintiff concerning pending matters of business; and alleging that the defendant had, in November last, received a sum of £1,200 for coals got from the Tipton colliery, and instead of paying that sum to the banking account of the said colliery, had paid part to the account of the law partnership, and had retained £200 thereof himself; and the bill alleged that the Tipton colliery was situated in a district the position of which at the present time, with reference to water, was such that in order effectually to drain the mines of the district, and work the same to the utmost advantage, there would be required a combined action by the proprietors of the several mines; and the owners of each mine would, in the meetings and arrangements necessary for the purpose between the proprietors of the several mines, have to assume their own position, and act with reference to their own interests, in connection with those of other mine owners; and it would be impossible for disunited owners, in the position in which the defendant had placed himself toward the plaintiff, to assume their proper position in such meetings and arrangements.

The 26th paragraph of the bill was as follows: "Considerable inconvenience has arisen in the ordinary working of the mine, and, in consequence of the conduct of the defendant toward the plaintiff, and the dissension which the defendant has caused, many of the workmen have ceased to work, and in consequence all the pits have ceased to be worked. The plaintiff and defendant have disagreed as to the price to be charged for coal, and have given contrary directions on the subject. The defendant has also countermanded orders given

by the plaintiff to the clerk to seek general customers for the coal, the defendant insisting that they should be supplied only to certain furnaces. The defendant has also ordered, that, contrary to the usual course, the prices shall not be inserted in the daily tickets of the coal supplied to certain furnaces. Inconveniences have also arisen as to the appointment and conduct of the partnership clerks and servants, and as to the general management of the works, in consequence of the course taken by the defendant, and the position of hostility to the plaintiff which he has assumed. Among other instances, the defendant has prevented the carrying out of an arrangement by which, on a change of butties or persons working the pits, the stock of the outgoing butty was to be taken by the incoming butty at a valuation, so that the pits might be kept going. The defendant also refused to concur in proceedings against the outgoing butty for misconduct in working the said colliery. In fact, the said defendant has rendered it impossible that the plaintiff and defendant can co-operate together in the working of the said Tipton colliery, in such a manner as the same ought to be worked and carried on for their mutual benefit and advantage. In an interview between the clerk of the plaintiff's solicitor and the defendant, the defendant expressed himself dissatisfied with the present management of the said colliery, and stated that in his opinion some person ought to be appointed to manage the same between him and the said plaintiff." The 27th paragraph suggested that some proper person ought to be appointed to manage the said Tipton colliery on behalf of the plaintiff and defendant, and to receive and pay the several sums of money receivable and payable in respect thereof.

The bill prayed, amongst other things, that an account might be taken of all dealings and transactions of the plaintiff and defendant, and of all moneys received and paid by them respectively, both in and about the said partnership of solicitors and attorneys, and also in and about the said partnership in the said colliery, and in certain other businesses which they had carried on together; and that what should be found due from the said defendant on taking such accounts might be paid by him to the plaintiff; and that some proper person might be appointed in like manner to manage the said Tipton

colliery on behalf of the plaintiff and defendant; and to receive and pay all such moneys as should be receivable and payable in respect thereof.

The bill did not pray for a dissolution of the partnership in the colliery.

The plaintiff now moved for a receiver, according to the prayer, supporting by his own affidavit the statements in the bill.

From the affidavits filed on the part of the defendant it appeared that the Tipton colliery estate consisted of a surface estate as well as mines; and the defendant's affidavit stated that the colliery was not worked by the plaintiff and defendant as a partnership, "but as the owners of two moieties of an estate jointly working the same together." The defendant admitted, that, in consequence of the fluctuations in price, he had, about the middle of the year, directed the omission of the price in the tickets; but he denied that any of his conduct had in any way interfered with the management of the colliery; on the contrary, he stated that the plaintiff had, since the autumn of 1852, had the entire management, and had dismissed and appointed servants without the defendant's interference; and the defendant stated, that though he had expressed an opinion that it would be well if they could have some substantial person who could draw checks, and be more intrusted than their present clerk, he never contemplated the appointment of a manager by the court; but he stated that he was most desirous that the colliery should be kept working, and the water kept down; and he stated that it would be highly injurious if the colliery were placed under management which he and the plaintiff could not control.

The plaintiff filed affidavits in reply supporting the case made by the bill, and stating that since he had assumed the management of the colliery the defendant had evinced "dissatisfaction and want of co-operation and confidence," which had produced a spirit of disaffection on the part of the workmen toward the plaintiff; that the defendant would not cooperate in the erection of a steam engine, and that he had taken the part of the butties in a claim made against them by the plaintiff for damages for the stoppage of two of the pits. There were also affidavits by two clerks of the colliery to the

effect that the plaintiff and defendant frequently gave contrary orders respecting the management of the works.

Mr. BACON, Q. C. and Mr. J. B. PRIOR, for the motion.

Mr. ROLT, Q. C. and Mr. CAIRNS, *contra*.

Vice-Chancellor SIR W. PAGE WOOD.

The principles involved in this case are of great importance, although perhaps the course that I ought to take on the present motion may not, strictly speaking, require the application, to the full extent, of the doctrine which was laid down by Lord Eldon in *Jefferys* v. *Smith*, 1 J. & W. 298; for there are circumstances here which seem to me to make this materially different from that case before Lord Eldon. Knowing the extreme caution with which Lord Eldon laid down any general principle, I am inclined to attribute more weight to any general principle enunciated by him than to the dicta in more recent decisions, which, though apparently general, must always be considered with special reference to the case immediately before the court.

In *Jefferys* v. *Smith*, Lord Eldon made several observations which did not apply to the case immediately before him, for that was a case of partnership and the bill prayed for a dissolution; but, during the argument, the counsel for the defendant were driven to say, "We can not contend that the defendant has a right to continue manager of the whole mine against the consent of the other owners; they may act for themselves, but they have no right to oust him of his own share because they can not agree with him. Persons who are tenants in common of land can not ask that a manager should be put in possession for all parties."

In answer to that remark Lord Eldon said, "The question is, whether mines have not been always considered, not altogether, but in some sort, as a species of trade. How it may be in Wales I do not know; but in my country, where there are frequently twenty owners of the same mine, if each is to have a set of miners going down the shaft to work his twentieth part, it would be impossible to continue working the

mine. Must not a contract be implied that it was to be carried on in a practicable and feasible way? I believe I have a note of a case before Lord Hardwicke which confirms me in the idea that where there are part owners of a mine, and they can not, by contract, agree to appoint a manager, this court will manage it for them." And on a subsequent day he said, "Lord Hardwicke in that case says, that a colliery is to be considered in the nature of a trade; and where persons have different interests in it, it is to be regarded as a partnership; and that the difficulty of knowing what is to be paid for wages and the expenses of management gives the court a jurisdiction as to the mesne profits which it would not assume with respect to other lands." Then he said, "On this ground, and on account of the peculiarity of this species of produce, the court gives an injunction against trespass, and allows a party to maintain a suit for the profits, which in other cases it would not do. Here there are twenty shares, and if each owner may employ a manager and a set of workmen you destroy the subject altogether. It renders it impossible to carry it on. It appears to me, therefore, upon general principles, and without reference to the particular circumstances of any case," (that is, he was not applying the remark only to the case before him,) "that where persons are concerned in such an interest in lands as a mining concern is, this court will appoint a receiver, although they are tenants in common of it." And that, no doubt, is the strongest part of the expressions in the judgment with reference to the general principle to be applied to the case now before the court. I do not find any case in which the court has proceeded to appoint a receiver of mining works in which the parties had not been working the mines together in partnership, nor where a partnership existed for the purpose of working the mine, if that were the extent of the partnership, without having before the court a suit for the dissolution of the partnership, except it may be that case of *Wynget* v. *Heathcote*, which was cited not from any report but from the recollection of counsel in the case of *Bentley* v. *Bates* (4 Y. & C. Exch. 182). The case of *Bentley* v. *Bates* itself certainly involves something of the same kind. In that case a demurrer to a bill, not praying for a dissolution, either as to the mines, which were the subject, or as to the

working partnership, for obtaining the profit to be derived from the property, was overruled; and it is certainly not the ordinary practice of this court to direct an account between partners, except upon a bill for the dissolution of the partnership concern. (See *Forman* v. *Homfrey*, 2 V. & B. 329; and *Russell* v. *Loscombe*, 4 Sim. 8.) It is true that it is not now necessary to ask for a dissolution in every case in which relief is sought respecting partnership affairs; but I apprehend that where a bill seeks for an account that is one of the cases in which a dissolution must be prayed. Unless some special ground is raised the general accounts can not be taken without asking for a dissolution of the firm; and yet in *Bentley* v. *Bates*, Lord Abinger held, in the case of a mining concern, that these accounts might be taken, although the bill did not pray for a dissolution of the partnership in the working of the mines. Therefore, that case must be considered an authority, that, without breaking up the partnership in a mining concern, a plaintiff might have the intermediate relief of a decree for an account, not general, but from year to year, and seems to furnish an analogy for an application for a receiver, although the bill does not ask to terminate the concern. On principle, that course would create enormous difficulty in the case of property held in fee simple, like a colliery, if the court is to be called upon, because of the owners' disputes, during the continuance of their holding the property in fee, to put in its own manager, and have a person appointed to manage it. If that be the proper course, the court, as Lord Eldon expresses it in *Goodman* v. *Whitcomb*, 1 J. & W. 592, might have to manage all the mining concerns in the kingdom. That can not be the true principle of the court.

What is the true principle, is, I think, pointed to in *Crawshay* v. *Maule*, 1 Swanst. 495; *Jefferys* v. *Smith*, 1 J. & W. 298; 3 Russ. 158, and *Waters* v. *Taylor*, 15 Ves. 10. The true principle must be this: In the case of a mining concern like this there may be two modes in which it may be viewed: it may be a mining concern really held as property by parties who never acquired it for the purposes of trade, as in a case where an estate containing mines has descended from the owner to two co-heirs; and such joint owners, though they did not acquire it for mining purposes, may nevertheless agree to

work the mines together with their joint property, and buy steam engines and pay workmen during that working. That would be working the mine in partnership. There would be a partnership in the working, though not in the land; and either of the joint owners might at any time change his mind, and say to the other, "I do not feel inclined to work jointly any longer, and all the accounts may be taken, and I will leave you to deal with your share as you please." One might then continue to work but he could not force the other to go on, and the one who continued to work might have to render an account. That was what happened in *Sir Francis Shuckburgh's Case*, (*Denys* v. *Shuckburgh*,) 4 Y. & C. Exch. 42, in the exchequer, and a discussion there arose, in consequence of one tenant in common having worked mines alone, from what period such account was to be rendered. The other case would be one in which, as in *Crawshay* v. *Maule*, the circumstances afforded evidence—as it is impossible to say that they may not ultimately do here,—that the whole property was intended to be used as a partnership concern; and, therefore, when any disagreement arose, any of the partners would have a right to come to this court to determine the partnership, and have the whole thing sold, as in *Crawshay* v. *Maule*. In either case it would be proper to ask for a dissolution and winding up of the concern, and then for a receiver to be appointed to manage the concern in the meantime, if the partners could not agree. This bill does not present distinctly either of those phases. I am not informed in which way the plaintiff regards it: whether, that he is working in partnership a mining property of which he is a tenant in common in fee; or that the estate was all acquired for the purposes of the partnership, and the plaintiff has therefore a right to have a sale of the whole. It is said that I may now assume that at the hearing the plaintiff will have a right to have a sale, and that the partnership will be clearly determined, and that therefore I may now appoint a receiver seeing what must be the result of the litigation. But I can not at present see that in this case. I do not foresee whether I am to dissolve the working partnership, or to sell the whole fee simple in the property.

In that state of things there is a great difficulty, as the law stands, in saying that the plaintiff is now entitled to have a

receiver appointed, who would only be brought in really for the purpose of continuing the business, as appears from the 27th paragraph of the bill; and still more strongly from the 26th, where the language points to a continuance of the working. Therefore, upon the statements in the bill, I think there would be great difficulty in appointing a receiver. I think also, upon the facts which are in evidence, there would be great difficulty, even if the bill had asked for a dissolution upon the ground of incompatibility in the mode in which the partners were working the mine; for am I not, as Lord Eldon says, to imply a contract for carrying on the business in a feasible way? I think that Mr. Bacon well described the result of the evidence when he said that there was a want of co-operation between these partners, but that, and interference are altogether distinct. The right to have a receiver would not arise on the part of a partner who, as the plaintiff appears here to be, was the managing partner, and had practically the sole direction of the business; he would have no case for coming here for the assistance of the court, only because the other partner would not co-operate with him. It is alleged that the copartner has refused to buy a steam engine. Suppose I appointed a receiver; could I compel him to buy it? The only mode of doing so would be this: the receiver might purchase it if there were assets for that purpose, and might, by the direction of the court, recoup the expense of it out of the profits of the concern when realized. But the managing partner, while the concern continues, can do exactly the same thing. Until his copartner interferes to prevent him, I apprehend he might incur any expense in the management that was beneficial for the purposes of the business. Just as a brewer might set up half a dozen vats at a large expense, so here the managing partner might set up a steam engine and work it as he thought proper. There is nothing done by his copartner to interfere with his doing so. So, again, as to the prices of coal. All that has happened at present is that one partner has said, "I will not sell at such a price," and the other has said, "I will." Each has a perfect right to sell at what price he chooses. That is not the case of *Jefferys* v. *Smith*. But it is not even alleged that Eberhardt has attempted to sell to any one at these particular prices. All that he has done is that he has gone to

the agent and told him to sell at such prices. The next thing is the alleged interference with the butties. That is the nearest approach to interference in this case. There was a disagreement, and the defendant took the side of the butties, and said they were right in what they did; but I think that is not such an interference as would authorize me to appoint a receiver at the instance of a partner who really seems to have the whole thing in his own hands. He at this moment is appointing and discharging workmen, and has not been interfered with in any of those proceedings by the defendant, Eberhardt.

It is further said that the mine will be drowned, because Eberhardt will not co-operate to prevent it; but the plaintiff may do what he likes to prevent that; he can not get money for that purpose from Eberhardt, but neither would the receiver be able; though I do not think that any one would advise Eberhardt, if it were done *bona fide*, in due exercise of the plaintiff's powers of management, that he could resist payment of the expenses out of the profits arising from the sale of the coals. In *Jefferys* v. *Smith*, the case was really this: One part owner said, "I am owner, and I will manage the concern;" the other said, "I will manage it;" and there was there a direct interference. And Lord Eldon said, "In my country, where there are frequently twenty owners of the same mine, if each is to have a set of miners going down the shaft to work his twentieth part it would be impossible to continue working the mine. Must not a contract be implied that it was to be carried on in a practicable and feasible way? Where there are part owners of a mine, and they can not by contract agree to appoint a manager, this court will manage it for them." If Eberhardt had said, I will send my people to work my part of the mine, this case would have been like *Jefferys* v. *Smith* in that respect, and I should then have struggled hard to have found some mode of relieving the plaintiff; but I am of opinion that no case has been made for such relief. Non co-operation, which leads one partner to act upon his own responsibility until interfered with, is not a ground for appointing a receiver of the property; and I think that this is not a case in which I should struggle to get over the difficulty; and therefore, there must be no order on this motion.

REID v. BARNHART ET AL.

(1 Jones Eq. 142. Supreme Court of North Carolina, 1845.)

Mine worked on family arrangement—Admission of partner against partner—Division of nugget. John Reid was the owner of a gold mine. His sons and sons-in-law agreed to work it, paying him one third, and dividing the residue equally among those who worked on the several days. Any one not working was at liberty to furnish one of his white family as a hand. The plaintiff sent his son on a certain date in his place. On this same day a nugget of gold weighing over nine pounds was found. The others then denied that the son had been accepted as a hand. It appeared that he had commenced work and then been sent for a dipper, and while absent one of the partners had made a remark in the nature of a concession that he was a hand, etc. *Held*, that this admission was evidence against all the partners; and that the plaintiff was entitled to his share in the proceeds of that day's labor, he having been thus represented by his son.

This cause was transmitted to the Supreme Court from the Court of Equity of Cabarrus County.

The bill is filed by George Reid, against George Barnhart, Robert Motley, Andrew Hartsell and John Reid, the younger. The case is that John Reid, the elder, was the owner of a gold mine in the county of Cabarrus, and in the month of November, 1834, he granted permission to his son and sons-in-law, who were the plaintiffs and defendants, and three others, to work upon the following terms: They were daily to pay him, the father, one third part of the gold found, and the residue of each day's gains was to be divided equally among those who worked on the several days. The son and sons-in-law were themselves to do the work personally unless they should be kept away at any time by sickness or indispensable business, in which case one so absent should be at liberty to send one of his white family as a hand in his place. The son and sons-in-law agreed to work the mine upon those terms, and proceeded to do so accordingly. On the 20th of November, 1834, the four defendants attended at the mine and went on to work in person, the plaintiff and the three other sons-in-law not being there. But the plaintiff, being necessarily detained at home,

sent Arthur Reid, his son, to work in his stead that day, and Arthur worked accordingly, as the plaintiff alleges. Shortly after the operations of the day were begun one of the defendants found a large lump of gold weighing about nine pounds avoirdupois weight, which, after paying to the father his share, the defendants divided among themselves.

The bill was filed by the plaintiff, claiming from the defendants an equal share of the gold found on that day, upon the ground that his son was sent by him, as his substitute, as he had a right to do, as he was an able and sufficient hand, out of his own family, and, at all events, that he had been accepted by the defendants as a hand and had been set to work in his father's place.

The answer admits that Arthur Reid was at the mine on the day mentioned, and at work, but the defendants say he worked by himself and for himself, and not with or for them; and they deny that they did receive him as a hand on account of his father, or that they would have done so, inasmuch as they alleged he was too young to do a man's work.

Upon the point thus in dispute there was much conflict in the depositions; so much so as to induce the court to direct issues to be tried in the Superior Court of Cabarras: 1st, whether Arthur Reid was received by the defendants as a hand to work in the stead and lieu of his father before the finding of the piece of gold on the 20th day of November, 1834, and 2d, if he were so received, whether he had been discharged upon the finding of the piece of gold.

On the trial of the issues, Judge Battle presiding, several witnesses were offered by the plaintiff, to prove that Arthur Reid was at the mine, at work, on the day in question, and that he was at one time sent to some distance by one of the defendants (but which is not stated) for an implement used in the mine, called a dipper, and that while he was gone the defendant Motley complained "that he stayed too long, and said that Arthur must be smarter, or he would send him home, and that George Reid, the plaintiff, should come himself or send a better hand." This was objected to as evidence against the other defendants, on the ground that one partner could not receive another person as partner without the concurrence of his copartners. But it was received by the court, and the jury

found upon that and other evidence both the issues in favor of the plaintiff against all the defendants.

His Honor thereupon stated the case so as to present the question, and enable the defendants to move this court to direct the issues to be tried over again if the court should be of opinion that the evidence was not proper against the defendants, and the defendants' counsel made that motion.

RUFFIN, C. J.—We are of opinion that his Honor rightly admitted the evidence. It is not a question about the admission of a stranger into the partnership by one of the partners without consulting his companions, for there is no pretense that Arthur Reid was to become a partner, or entitled even to wages for his labor from the defendants.

The father was the partner, and he had become so by agreement with all the defendants; and the only question was, whether he had complied with his contract so as to entitle him to a share of the gains by sending a competent hand in his stead, as provided for on the agreement. The plaintiff says he did, and to establish it he says the defendants themselves accepted the person he sent as a hand for him. It is surely evidence of the fact of acceptance that the young man was engaged openly in the work, and that one of the defendants, from the deference due to his years, or superior skill, undertook to direct the operations of this person, for the common good; spoke of him as his father's substitute, no one at the time making objection to the hand, nor to the acts or declarations of the person thus assuming authority over the hand. Such circumstances tend certainly to show that all concerned recognized Arthur as the substitute of his father.

The court therefore is satisfied with the result of the trial. It entitles the plaintiff to the decree he asks, and it must be referred to the clerk, to take an account of the sum due to the plaintiff in the premises and inquire which of the defendants holds the fund.

Decree accordingly.

[1]RHEA v. VANNOY ET AL.

(1 Jones Eq. 282. Supreme Court of North Carolina, 1854.)

[2] **Accounting sought by deserting and insolvent adventurers.** Rhea, Vannoy, Garland and McKay, entered into a written agreement for the purchase of lands, and to work them by mining, etc., as partners. One of the specifications was that such disposition was to be made of the property as a majority might deem advisable. Lots were purchased under statutory sales, the legal title, however, remaining in the State. After outlays made it appeared that the land would not pay for mining. Two of the partners who were wholly insolvent deserted the adventure; a third, who was at least partially insolvent, went to Georgia, "where he thought the prospects of finding gold were more flattering." Vannoy, being left as the only partner adhering to the adventure, to relieve his sureties and save further liability for unpaid purchase money, disposed of the land for the best price obtainable. *Held*, that the abandonment by three out of the four partners superseded any contract for a concurrence of the majority. 2, That neither of the abandoning partners had any equity against Vannoy's disposition of the property, especially as against a purchaser at a fair rate without notice of any equity.

Limitation of the account. All that such abandoning partners could ask under such circumstances would be an account of the moneys received on the disposition of the land, and for any tolls, rents or profits arising out of the mining or other operations of the adventure.

Cause removed from the Court of Equity of Cherokee County, at Spring Term, 1854. The facts of the case sufficiently appear from the opinion of the court.

J. BAXTER and GAITHER, for the plaintiff.

WILLIAMS and J. W. WOODFIN, for defendants.

PEARSON, J.

In 1838, the plaintiff, Rhea, and the defendants, Vannoy and Garland and McKay, whose heirs are defendants, entered into a written agreement, under seal, in regard to certain tracts of land bid off at the land sales, in Cherokee county, among others, lots Nos. 4 and 5 in District 7, the subject of this controversy. According to this agreement the parties were to

[1] See *Rhea* v. *Tathem*, 11 M. R. 321.

[2] *Jekyl* v. *Gilbert*, 1 McNight. S l. Ca 29; *Davis* v. *Johnston*, 4 Sm. 539; *Clegg* v. *Edmondson*, 8 M. R. 180.

own the land as copartners, pay for it equally and share equally in all profits arising from mining operations or agricultural pursuits or other use or disposition of the land; "such disposition to be made of the property as a majority might deem advisable." One eighth of the price was paid in cash, and the balance secured by note and sureties, as required by the statute. Lot No. 4 was purchased at $879.75, and there was paid thereon, including the one eighth paid in cash, $513.11. The excess over one eighth was paid by Vannoy, except $50, which was paid by the plaintiff, but Vannoy alleges he let him have this money. Lot No. 5 was purchased at the price of $270.56, and there was paid thereon $76.37. The excess of this sum over the one eighth was paid by Vannoy. The bonds to secure the purchase money were executed by McKay and Vannoy, with one Peircy and Carson as sureties. Rhea was an obligor in the small note for lot No. 5, and the certificate of purchase was given in the name of David McKay & Co. McKay became insolvent and left the county, and afterward, in 1845, Vannoy sold the land to the defendant Daws, and executed a deed therefor, and received from him $500 in money and an obligation to assume the payment of the balance due on the bonds given for the purchase money, and relieve the principals and the sureties from the payment thereof, and have his name substituted as principal on the bonds, which was accordingly done by the consent of the agent of the State, and the note then stood in the list of notes where the principals are solvent. After the passage of the act of 1850, which provides for a re-valuation, Daws was recognized by the commissioners appointed under that act as the purchaser of the land, and the person entitled to take out the grant upon the payment of the balance of the purchase money, and they gave him a certificate to that effect. Upon the re-valuation, the price to be given for the land was reduced about $400, so as to leave only about $60 to be paid upon the bonds in which Daws was the principal, he having before made a payment of $100. The plaintiff, after the act of 1850 was passed, bought the claim of Garland, and having, as he alleges, previously bought the claim of McKay so far as regards the mineral interest, filed this bill to enjoin the defendant Daws from taking out the grant in his own name, and praying that he may be

declared, by a decree of this court, to be entitled to one half of the land, *i. e.*, one fourth as an original copartner, and one fourth as the assignee of Garland, and to one fourth of the mineral interest in the whole as the assignee of McKay, and that partition be made accordingly; and in the alternative, if he is not entitled to the relief prayed for against Daws, that Vannoy may be required to account for the amount received of Daws in the sale of the land; also for the large sums which he had previously received by way of tolls and rents, and profits made by him, both in mining operations and agricultural pursuits.

The defendant Garland, who is described in the bill as a citizen of the State of California, and the defendants, the heirs of McKay, who are described as citizens of Blount county, Tennessee, do not answer, and the bill is taken *pro confesso* as to them.

Vannoy in his answer avers that, besides his own, he also paid McKay's part of the cash installment of one eighth; that he let the plaintiff have the $50 which he paid on the bonds, and that he made all other payments that were made on the bonds; that a small part of the amount so paid by him was the proceeds of the tolls, rents and profits that he had made from the lands, which he applied toward the extinguishment of the bonds, but he was under no obligation to use the land for mining or farming purposes unless he chose to do so; that the plaintiff worked at different times and different places on the land just as he chose, but failed to make any payments on the bonds, although he supposes, judging from the result of his own operations, that the profits were small; that he paid out his own money and property, which was sold under executions issuing on the judgments taken on the bonds, a sum exceeding $50; that McKay, soon after the purchases, became insolvent and ran away and went to parts unknown, and abandoned all further connection with the business; that Garland resided in the county of Yancey, and finding the land not valuable for mining purposes, and not being a party on the bonds, gave himself no further concern about it; that Rhea was insolvent, and left the county and was absent when the time came for suits to be brought on the bonds, and gave himself no further concern about it until after the passage of the act of 1850, un-

der which proceedings were taken by the defendant Daws, and the valuation was reduced nearly one half; and he avers that neither McKay nor Garland nor Rhea offered to assist him in any way, either by furnishing credit or funds, and thus he was deserted and left alone and unsupported, to do the best he could in the premises; that after he had been sold out and become insolvent, the sureties urged him to relieve them by disposing of the land, as it was impossible for him to pay for it; this could only be done by a surrender, under the act of 1844, or by selling to some solvent person who would agree to take the trade off their hands and assume the payment of the bonds, or rather the judgments which had been taken upon them; accordingly he transferred the lands to the defendant Daws, who became the principal in the bonds, and thereby relieved both the former principals and the sureties, and paid him $500, which he avers will not reimburse him for the money he has paid, and the costs and other losses he has been subjected to, after making full allowance for the tolls, rents and profits he has been able to realize.

The defendant, Daws, avers he purchased the land and took a conveyance from Vannoy, who was in possession and had the entire management and was insolvent and unable to complete the purchase or relieve his sureties except by making some disposition of the land; that he paid him $500 in cash and assumed to pay the balance due on the bonds given to secure the purchase money. This, he avers, was a full consideration. He also avers that he purchased without notice of any equity on the part of the plaintiff. He also avers that, under the deed of bargain and sale executed to him by Vannoy, he took possession in 1845, and has held a continued adverse possession for more than seven years before the bill was filed.

The manner in which the lands in the county of Cherokee were sold, the privileges given to purchasers, the many acts that have been passed for their relief, the facility given to the transfer of these land claims, and the surprising extent to which they have been made the subject of traffic and speculation, present an anomalous condition of things, to which it will be very difficult to apply the ordinary rules either of law or equity.

Are the purchasers or their assignees, before a grant has issued, to be considered for any purpose as claiming the legal estate? Is there no law in Cherokee, and must all controversies in regard to these land claims be carried into the court of equity? Can a purchaser for valuable consideration without notice protect himself in no case, on the ground that he is not clothed with the legal title? If the legal estate is in the State for all purposes and the transaction be treated as a mere contract of sale, then by the ordinary rules of equity the vendor is a necessary party, for otherwise he will not be bound, and the decree will not end the litigation. How can the State be made a party so as to be bound to make title according to the decree? Can the officers of the State be made parties? Will no length of adverse possession under color of title quiet a man in the enjoyment of his estate, on the ground that the title is in the State, and *nullum tempus occurit regi?* These are questions suggested by an examination of this case, but which we are now called on to decide, and we prefer to follow a prudent rule and feel the way as we go. We are satisfied from the bill, answer and proofs, and many concurring circumstances, that the averments of Vannoy are true. The land turned out to be only valuable for farming purposes. McKay became insolvent, left the country, and abandoned all interest under the agreement. Garland, who was not liable as obligor, also abandoned it, and Rhea, if not insolvent, certainly was not in condition to be able to raise the amount necessary to discharge the balance due on the bonds, if he had been willing to do so, and it could not be forced out of him by legal process. So, he also abandoned all interest under the agreement, and went to Georgia, where he thought the prospects of finding gold were more flattering. This conduct on their part superseded the stipulation by which a concurrence of a majority was required in regard to the disposition of the land; or rather, it amounted to an implied concurrence or consent that Vannoy, who was left as the only acting and managing partner, might make any disposition of the land that was necessary and proper in the emergency, in order to relieve the members of the firm and their sureties from the embarrassment in which they were placed. Good faith and fair dealing support this inference, and all they could in equity

require of Vannoy was to dispose of the land *bona fide*, so as to make the most of it, and to account to them for whatever he was able to save out of the wreck. We are satisfied he acted with *bona fides* and made an advantageous disposition of the property, considering the circumstances. Upon this broad ground of substantial justice we think the plaintiff has failed to establish any equity against the defendant Daws, and can not, after Daws has relieved "the firm" from a burthen that it was not able to bear, come into a court of equity and ask to deprive him of the benefit of a statute passed five years afterward, upon any technical rights growing out of the agreement of copartnership, which they had long before abandoned. In *Rhea* v. *Tathem*, *post* 321, decided at this term, where the facts are the same, it is held that Vannoy had the right, under the act of 1844, to surrender the land. If he had done so in this instance the plaintiff would have had no right whatever; consequently it can be no ground of complaint that instead of doing so he disposed of the land to the best advantage, so as to give the plaintiff a right to call for an account and to share in whatever has been saved.

To prevent the inference that we think any other relief except an account against Vannoy could be given under this bill, had the plaintiff made out his case, it is proper to notice the prayer, *i. e.*, that the defendant be enjoined from taking out a grant, and be decreed to account for profits; and in the event he should obtain a grant, that he be declared a trustee, and that partition be made, and for general relief.

The prayer for an injunction against obtaining a grant, except as secondary, and in aid of some other relief, is without precedent.

The plaintiff must be entitled to relief at the time the bill is filed, and can not ask for relief upon the happening of a future event; consequently, the admission that neither of the parties had the legal estate puts the prayer for partition out of the question. Partition is made of the "*corpus*." The parties must have the legal estate in order to make it; an interest under a contract of purchase can not be *divided into parts*.

The prayer that the court will make a declaration of its opinion as to how the parties are respectively entitled under

the contract of purchase, and the prayer for general relief, can answer no purpose; for the court will not make a declaration of its opinion as to which of two parties is entitled to an equity unless it can take some action, and enforce the right by its decree: *Tayloe* v. *Bond*, Bus. Eq. 5.

This court has no right to give its opinion as to which of two persons the sovereign ought to issue its grant. How the plaintiff could get a case constituted in court so as, according to the course of the court, to be able to follow the land before the title was passed out of the State, is one of the difficulties growing out of the supposition that the legal title is, to all purposes, still in the State alluded to above.

Bill dismissed as to Daws, with costs, and decree for an account between plaintiff and Vannoy, to include the $500, and such tolls, rents and profits as were received by either of the parties up to the time of sale to Daws, and the payments made by each.

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[1]RHEA ET AL. V. TATHEM ET AL.

(1 Jones' Eq. 290. Supreme Court of North Carolina, 1854.)

Abandoned partner operating on his own account. A, B, C and D entered into a copartnership, to purchase a tract of land at the Cherokee sales, and to work the same for gold. A and B only gave bonds for the purchase money, with sureties whom they procured. All except A left the country, abandoned the work for several years and gave him no aid, but suffered him to be pressed for the money. A, in good faith, to relieve his sureties, surrendered his land to the State, and afterward, under another act, purchased a pre-emption to the same tract which he sold for a sum of money: *Held*, that neither the original partners nor their assigns could hold A to account for this money.

Cause removed to this court from the Court of Equity of Cherokee County, at Spring Term, 1854.

The whole case is set forth in the opinion of the court.

[1] See *Rhea* v. *Vannoy*, 11 M. R. 315.

J. BAXTER, for the plaintiffs.

WILLIAMS, GAITHER and J. W. WOODFIN, for the defendants.

PEARSON, J.

The defendant, Tathem, purchased of the defendant Vannoy, the "pre-emption right," at the price of ten dollars, and the further consideration that Vannoy should be allowed the full benefit of all mineral interest in the land; and to secure the enjoyment thereof Tathem executed to Vannoy a penal bond. Tathem paid to the State the amount at which the land was valued, and, in the words of the bill, "the said land was duly and legally granted in fee simple to him."

Tathem avers that he is a purchaser without notice of any equity on the part of the plaintiffs.

After Tathem obtained the grant, Vannoy sold all his interest in the minerals to the defendant Woodfin, for the sum of four hundred dollars, and he associated with him the other defendants, Woodfin and McDowell, and they aver that they are purchasers without notice of any equity on the part of the plaintiffs. The plaintiffs have not, by their proofs, affected these defendants with notice, and as to them the case fails; so the question is as to the defendant Vannoy. In 1838, Vannoy, the plaintiff Rhea, and Garland, the assignor of the plaintiff Thomas, and McKay, the ancestor of the other plaintiffs, entered into a written agreement, under seal, in regard to certain tracts of land bid off at the land sale in Cherokee, among others, No. 41, district 7 (the subject of this controversy).

According to this agreement, the partners were to own the land as copartners, pay for it equally, and share equally in all profits arising from mining operations or agricultural pursuits or other use or disposition of the land; such disposition was to be made of the property, "as a majority of them might deem advisable." One eighth of the price was paid in cash, and the balance secured by note and sureties as required by statute.

In 1845, all the plaintiffs being absent from the State (as the bill alleges), "engaged in private business," Vannoy sur-

rendered the land to the State, according to the provisions of the act of 1844, entitled "An act more effectually to secure the debts due for Cherokee lands, and to facilitate the collection of the same," the securities given for the balance of the purchase money (upon which judgments had been taken) were canceled and the judgments discharged.

In 1847, the plaintiffs being still absent from the State, Vannoy applied for and obtained a certificate of the pre-emption right, allowed to purchasers who had surrendered. He took the certificate in his own name alone, and afterward sold it to Tathem, reserving the mineral interest, which he afterward sold to Woodfin as stated above.

The plaintiffs insist that Vannoy had no right to make a surrender; that he did so in fraud of their rights, and with a view to his own benefit, and is bound to account and pay over to them equal shares of the sums realized by him, for and on account of the pre-emption right, to which, as they allege, they were equally entitled; that is, $400 by the sale, and other large sums by working a rich gold mine, before he sold the mineral interest.

They insist further that if Vannoy had a right to make the surrender in their absence, and can not be made liable on the ground of fraud, still, as they were copartners and joint purchasers, they were, under the 2d section of the act of 1846, entitled as purchasers to a joint interest in the "pre-emption right," and the defendant, although he took the certificate in his own name, will, in equity, be deemed a trustee so as to let them in for equal shares of the profit derived from the "pre-emption right."

Vannoy, in his answer, avers that the bonds for the balance of the purchase money were executed by him and McKay alone, as principals, with one Piercy and Carson as their sureties; that McKay became insolvent, ran away and went to parts unknown, and the writs, issued upon the bonds against himself and McKay and the two sureties, were returned *non est inventus* as to McKay, and the judgments were taken against himself and the sureties; that the plaintiff, Rhea, was also insolvent and had left the country; that Garland resided in the county of Yancey and paid no attention to the business; that his alleged assignee, the plaintiff Thomas, resided in the

county of Haywood, and was at the time absent from State; that neither Rhea, Garland nor Thomas offered to assist him in any way, either by furnishing credit or funds, and thus he was deserted and left unsupported and alone to do the best he could in the premises; that he himself became insolvent, and although he wished to hold on to the land, yet he was compelled to take the benefit of the act of 1844, which allows the land to be surrendered when the commissioners certify that the *principals* in the bonds are insolvent; that accordingly the commissioners did duly certify (and according to the truth) that he and McKay (the principals in the bonds) were insolvent; that the land was thereupon surrendered and the bonds and judgments thereon discharged and considered to be released and satisfied, and that in making the surrrender he acted under compulsion and without fraud, that being the only way in which he could relieve the sureties, which in conscience he felt bound to do. The answer further avers that afterward, upon the passage of the act of 1846, the defendant Vannoy became entitled, under the 2d section to the "pre-emption right," as a purchaser who had surrendered, and who was an *actual settler* on the land; that neither McKay nor his heirs nor Rhea nor Garland nor his alleged assignee, Thomas, were in any way interested or entitled to participate in such pre-emption right, for they were all expressly excluded by the 7th section, which provides, "the pre-emption right granted by the 2d section of this act shall not extend to any person or persons who are not actual settlers on the land, who do not design to become permanent residents of the county"; upon looking into the proofs we are satisfied that McKay and Vannoy alone executed the bonds as principals. That McKay became insolvent and left the State. Vannoy also became insolvent, and judgments were taken against him and his sureties. There is no evidence that either of the plaintiffs offered to assist in any way by credit or cash, and consequently Vannoy was compelled, in order to relieve his sureties, to make the surrender. So the charge is wholly unsupported; in fact, Vannoy could not have made the surrender with a view to his own benefit, for he did so before the passage of the act, which confers the "pre-emption right on purchasers who had surrendered, being actual settlers or persons desirous of becoming permanent residents of the county."

The charge of fraud certainly comes with an ill grace from the plaintiffs, who deserted their partner and left him to get out of the difficulty in the best way he could. The first ground on which the plaintiffs place their equity fails.

The second ground depends upon whether the plaintiffs, or either of them, were entitled, under the act of 1846, to a participation in the pre-emption right as purchasers who had surrendered; for if they had such an interest they have an equity by which to hold Vannoy as a trustee, and to consider him as having obtained the pre-emption right as well for their benefit as his own, by reason of their former connection as partners, and to hold him to an account for such profits as he may have realized therefrom. This equity we think clear, from analogy to the well settled doctrine in regard to the renewal of leasehold estates. "If a trustee or executor, holding renewable leaseholds, renew in his own name, he can not hold for himself even though a renewal of the former trusts may have been refused by the lessor; the same result will follow by a mortgagee or *partner*, or by a tenant for life; for although he may not be bound to renew, yet if he does renew *behind the back of the other parties interested*, he can not, by converting the new acquisition to his own use, derive an unconscientious benefit out of the estate on which it is a graft." Adams' Eq. 60. So the question is, were the plaintiffs, as purchasers who had surrendered, interested and entitled to participate in the "pre-emption right." The 7th section expressly excludes all who are not actual settlers on the land or desirous of becoming permanent residents of the county. McKay is out of the question, and there is no allegation in the bill by which to bring either Rhea, Garland or Thomas within the requirement of the act; so the field was open to Vannoy, and there was no reason why he could not, with a good conscience, avail himself of a benefit which the act conferred, and which was preserved to him on account of his residence.

Bill dismissed with costs.

[1] RICH v. DAVIS & Co.

(6 California, 164. Supreme Court, 1856.)

[2] **Partnership of mining concern with merchant.** Where a mining company, not incorporate, forms a trading partnership with an individual under a firm name, each member of the mining company is a member of the firm.

Salesman not a dormant partner. Where one of the mining company acted as salesman of the firm it can not be pretended that he was a dormant partner whose acts would not bind the firm.

Appeal from the District Court of the Tenth Judicial District, County of Nevada.

The Flushing Mining Co., composed of eleven members, formed a partnership with Hamlet Davis, for trading, under the firm name of Davis & Co. Israel J. Hirst, a member of the mining company, acted as salesman in the store of Davis & Co. Davis and the Flushing Mining Company each put in an equal amount of capital. Dysart and Voorhies, two members of the latter, attended to the business for the company. Hirst executed a promissory note in the name of Davis & Co. which passed by indorsement to the plaintiff, and on which this action is brought. Hirst had on a previous occasion signed the firm name to a certificate of deposit, which had afterward been paid by the head of the firm.

The case was tried in the court below without a jury. The above facts appear in the finding of the court, upon which it gave judgment for defendants. Plaintiffs appealed.

McCONNELL, ROBINSON and BEATTY & SACKETT, for appellant.

BUCKNER and HILL, for respondents.

The opinion of the court was delivered by Mr. Justice HEYDENFELDT. Mr. Chief Justice MURRAY concurred.

[1] S. C. on former appeal. 4 Cal. 22.

[2] See *Flint* v. *Eureka Marble Co.* 11 M. R. 588; *Partridge* v. *Kingman*, 130 Mass. 473.

The facts found by the district court establish that Hirst was a member of the "Flushing Mining Company," the members of which, together with Davis, constituted the firm of Davis & Co., in whose name the note was executed by Hirst. This makes Hirst, beyond controversy, a member of the firm of Davis & Co.

The only remaining question is, was he such a dormant partner as would prevent his acts from binding the partnership? He was a salesman in the store of Davis & Co., and the findings show that on one occasion he had signed the firm name to a certificate of deposit, which was afterward recognized and paid by Davis, the head of the firm; that this was to the same person to whom this note was made.

Slighter circumstances than these would, I think, be sufficient to show the authority of Hirst to bind the firm. The fact that he was a partner and actively engaged in the business of the partnership as salesman ought to be enough. The other circumstances only add strength to that which was strong enough without them.

The judgment is reversed and the cause remanded.

PATTERSON v. SILLIMAN.

(28 Pennsylvania State, 304. Supreme Court, 1857.)

Construction of agreement to borrow capital upon firm credit. Where articles of copartnership provided for certain advancements to be made by each partner, "after which it is understood that should it be necessary to obtain more money for the completion of the works such money is to be raised between us on our joint note, or otherwise," the true construction of the agreement is, that after each partner had advanced the sums stipulated in the agreement, any further money required was to be raised by the joint efforts and upon the joint credit of the partners.

[1] **Forfeiture of share—Burden of proof on forfeitor although defendant.** Where an agreement of copartnership provided that the party violating the stipulations of the agreement should forfeit his interest in the concern, and at the option of the other partner might be ejected therefrom, by such other partner refunding to him the money advanced to expend in the same, it was *held:* 1, That it lies upon the partner claiming a right to forfeit the interest of his copartner, to prove fully

[1] *Oreamuno* v. *Uncle Sam Co.*, 1 M. R. 32.

and clearly that a cause of forfeiture had arisen. 2, That the *onus probandi* will lie upon the party asserting and claiming the forfeiture, although he be respondent to a bill in equity in which the complainant avers performance on his part and ejection by the other without cause.

[1] **Lease as firm assets—Forfeiture of lease.** Where a lease is made of certain coal mines to two persons as tenants in common, and the lessees afterward associate themselves as partners for the purpose of mining, shipping and selling coal from the demised premises for the whole period of the lease, the leasehold is thereby converted into partnership assets, and becomes the property of the firm. If a stipulation in such lease provides that any transfer or assignment of the lease by the lessees, or permitting it to be seized in execution, should work a forfeiture of the lease, and enable the lessors to re-enter without prejudicing their right to claim damages from the lessees, such forfeiture is not incurred by a sale of the leasehold estate under a decree of a court of chancery as the property of the firm.

Appeal from the Common Pleas of Schuylkill County.

This was a bill in equity, in which Frederick Patterson was the complainant, and Alexander Silliman respondent. On the 1st November, 1851, the Kentucky Bank, by its agent, John C. Bullett, Esquire, leased to Frederick Patterson and Alexander Silliman the veins of coal known as the "Tuscarora" mines situated in Schuylkill county, for the term of twenty years from the date of the lease. The lessees agreed to mine and take out at least forty thousand tons of coal per annum during the continuance of the lease, and to pay twenty-five cents per ton for all coal taken out by them. The lease contained the following clauses:

"The said party of the second part bind themselves not to assign or transfer this lease, or any part thereof, without the consent of the said party of the first part, in writing, first had and obtained, or permit or suffer the same to be seized or taken in execution; but such sale, transfer, assignment, or seizure in execution, shall, *ipso facto*, work a forfeiture of this lease, and all the rights of the party of the second part of, in and to the same."

"The said party of the second part agree that any failure on their part to fulfill any of the covenants of this lease, shall be deemed and considered a forfeiture of the same; and the said party of the first part may, if they see proper, re-enter and take possession of the said demised premises, without

[1] *Messer* v. *Messer*, 59 N. H. 375 : *Bank of England Case*, 3 De Gex, F. & J. 645 ; *Rust* v. *Chisolm*, 57 Md. 376.

prejudicing any claim they may have of damages for any breach of the covenants of this lease."

On the 31st day of March, 1852, Patterson & Silliman entered into articles of copartnership for the purpose of mining, shipping and selling coal from the mines leased to them by the Bank of Kentucky, of which the material clauses are recited in the opinion.

The parties commenced operations under the lease, and prosecuted the business of opening and preparing the mines, erecting fixtures and machinery, and mining coal, until in the beginning of the month of November, 1852. Their expenditures then amounted to over $10,000, of which Patterson had paid between $2,600 and $2,800, and Silliman $2,000 in cash, and machinery for the colliery, which he alleged was worth $2,800; and for the balance of the expenditure the firm was in debt. The parties about this time differing in regard to the manner of raising funds to prosecute the operations and pay the indebtedness, Silliman, the respondent, tendered to Patterson, on the 12th November, 1852, the sum of $2,700; being the sum, as Silliman alleged, which Patterson had put into the concern. Patterson refused to receive the amount tendered. On the same day Silliman caused the following notice to be served on Patterson:

POTTSVILLE, 12th Nov. 1852.

FREDERICK PATTERSON, ESQ.:

Dear Sir.—Your failing to comply with the terms of our agreement of copartnership, dated the 31st day of March, A. D. 1852, to carry on the mining operations on the Kentucky Bank lands, and your avowed determination not to comply with the same and refusal to furnish your proportion of the means to conduct the same, has left me no alternative but to dissolve the partnership. You are therefore notified that the partnership is this day dissolved, and that the mining operations will hereafter be conducted by me on my individual account. Your ob't servant,

A. SILLIMAN.

And on the following day Silliman also caused a notice of dissolution of the partnership to be inserted in "The Miners' Journal," a newspaper published in the borough of Pottsville.

In accordance with these notices Silliman took possession of the mines, colliery, and the property belonging to them, and refused to recognize Patterson as a partner any further in the concern.

The complainant, on the 2d December, 1852, filed this bill, in which he recited the facts as they are substantially contained in the foregoing statement. It concludes by asking an account and that the respondent might be restrained from receiving the partnership money or making a sale of the partnership property, and for the appointment of a receiver, for a decree of dissolution, and for a sale of the partnership property.

The case came on for hearing in the court below, on the bill, answer, and proofs, and after argument by counsel, the two judges who heard the cause (the other being related to one of the parties) differing as to the relief to which the complainant was entitled, the bill stood dismissed.

The complainant thereupon appealed to this court.

CUMMING, LOESER & CAMPBELL, for the appellant.

BANNAN & HUGHES, for the appellee.

The opinion of the court was delivered by KNOX, J.

The bill sets forth that on the 1st day of November, 1851, the Kentucky Bank granted a lease to the complainant, Frederick Patterson, and the respondent, Alexander Silliman, of four certain coal mines in Schuylkill county, for the period of twenty years, the lessees to raise and pay rent for at least forty thousand tons of coal yearly. That on the 31st day of March, 1852, they entered into a written agreement of copartnership for mining and selling coal from the land leased to them, and prosecuted the business of opening and preparing the mines, erecting fixtures and machinery, and mining coal, until the beginning of the month of November, 1852, in which time their expenditures had amounted to over $10,000, $2,800 of which had been paid by the complainant, $2,000 by the respondent, and for the residue the firm was indebted. That the complainant declined making any further individual advances,

and insisted that the means further required for the progress of the business should be raised on the joint credit of the firm; which the respondent at first assented to, but afterward declined. That, on the 12th day of November, 1852, the respondent tendered to complainant $2,650, and gave him notice that he had dissolved the partnership, under the agreement of 31st of March, 1852, and that thenceforward the respondent would carry on the mining operations on his individual account, and that on the next day the respondent caused a notice to be inserted in the Miners' Journal to the like effect.

The bill, after alleging that the money tendered was refused, prays for an account of the partnership transactions from its commencement; for an injunction against the respondent to restrain him from receiving any partnership debts or money; for the appointment of a receiver; that a dissolution of the partnership may be decreed, and for a sale of the partnership property, and for general relief.

The answer admits the lease, the possession of the premises under the lease, the execution of the articles of copartnership, and the expenditure of $10,000 and upward before the 12th day of November, 1852; alleges that the complainant's advances were not $2,80., but were $2,604.91, and avers that the respondent's advances to the firm were $2,750.93 cash, and $2,858.59 in machinery and property. It also admits that the complainant declined making any further individual advances, and charges that he at all times declined making advances of any kind in accordance with the terms, spirit and meaning of the agreement of copartnership, and did not advance the sum of $2,000 at the periods required for the progress of the work, but delayed doing so until the work and credit of the firm had greatly suffered for the want of the said funds, and until after the respondent was obliged to raise funds on his own responsibility to continue the works at the mines.

The answer denies that the complainant insisted that the means further required for the progress of the work, after his alleged advances, should be raised on the joint credit of the partners, or that he offered so to raise the necessary funds, or that they could be raised on the joint credit, or on any terms that would not have resulted greatly against the interest and credit of the firm, and also denies that the respondent ever

consented to a proposition of George Patterson to raise funds on joint responsibility, or that any other proposition or means of raising money on joint credit was proposed by the complainant, but that the respondent was at all times willing to raise money on the joint liability of the firm, provided it could be raised on such terms and to such an amount as would not embarrass the credit and business of the firm. The respondent further denies that the complainant at any time offered to raise any amount of money required on the credit of the firm, and alleges that he declined raising any further money, either individually or jointly, so long as the respondent had anything further to do with the concern, and that he said it might be sold by the sheriff.

The answer further charges the complainant with using the name of the firm to raise money for his own private purposes without the knowledge and consent of the respondent, and with a violation of the agreement by refusing to take the respondent's machinery.

It admits the tender to the complainant of $2,700, and the publication of the notices of dissolution of the partnership on the 12th November, 1852, and claims that he had a legal right to dissolve the partnership under the agreement, and that it was necessary so to do in order to protect the property from forfeiture by the Kentucky Bank, by virtue of a power to that effect contained in the lease; and further alleges that, under the terms of the lease from the Kentucky Bank, no sale of the partnership effects and property can be ordered without causing a forfeiture to the bank of all the expenditures of both complainant and respondent, and likewise subjecting them to an action for damages by the said bank. A general replication was put in by the complainant to the answer. An examiner was appointed, and the testimony taken on both sides. Upon the final hearing in the common pleas, before the president and one associate, (the other being related to one of the parties,) the court were divided in opinion as to the measure of relief to which the complainant was entitled, and the bill was consequently dismissed. The president judge was of the opinion that under the bill, answer, and proofs, according to the principle of equity pleading and evidence, the complainant had forfeited his interest in the copartnership prop-

erty, and was not entitled to the relief prayed for. The associate judge was of a different opinion.

The first question is presented upon the construction of the articles of copartnership, bearing date the 31st day of March, 1852.

These articles, after stating that the parties have agreed to associate themselves for the purpose of mining, shipping and selling coal, under the lease granted to them by the Kentucky Bank, designate the terms of the partnership substantially as follows: Silliman to furnish from the St. Clair colliery such machinery and property as he then had, which could be advantageously used at the Tuscarora colliery, at a valuation and appraisement to be made by men to be mutually chosen; Patterson to furnish $2,000 in ready money, to be appropriated toward the work as it progressed, to pay for the work and labor day by day, until the sum was expended; after this expenditure Silliman to furnish $1,000, to be paid and appropriated toward the work from time to time as it might be wanted; "after which," says the agreement, "it is understood, that should it be necessary to obtain more money for the completion of the works, such money is to be raised between us on our joint note, or otherwise." Both parties were to give their strict attention to the business, and neither was to use any funds belonging to the firm without the consent of the other partner, and not to use the name of the firm for private purposes, or for accommodation of others, without first having the consent of the other partner. The language of that part of the agreement which provides for a forfeiture of the interest of the defaulting partner is as follows:

"Any violation of the above stipulation will render this agreement null and void; and the party thus violating or non-complying with the stipulations above mentioned shall forfeit his interest in the concern, and at the option of the other party complying, may declare, and of right shall not be considered a partner, and may at any time be ejected; not, however, without first refunding to the party thus ejected all such moneys as he may have advanced, appropriated, or expended at the colliery, with interest on the same."

Although the first clause of the agreement, in reference to a

forfeiture, refers to "the above stipulation," yet what immediately follows shows that the intention was to include in the causes of forfeiture all the substantial stipulations contained in the agreement. The complainant and the respondent differ in their construction of that part of the agreement relating to the method of raising money after the individual advances had been expended. The agreement says, "such money is to be raised between us, on our joint note or otherwise." We are of opinion that the proper construction to be placed upon these words is, that after each partner had advanced to the firm the amount stipulated to be advanced, any further moneys required were to be raised by the joint efforts and upon the joint credit of the two. The words "or otherwise" refer to the means to be used by the firm in obtaining money, and the security to be given therefor, and do not create any obligation to make further individual advances.

The causes of forfeiture provided for in the agreement were:

1st. The neglect or refusal of either partner to make the stipulated advances.

2d. The refusal to allow such other moneys as the business of the firm required to be raised by the joint means and upon the joint liability of the firm.

3d. Neglecting the business of the firm, or using its money or credit for private purposes, or to accommodate others, without both partners consenting.

The burthen of proof of default clearly lies upon the partner claiming the right to forfeit the interest of his copartner; and the evidence in this respect should make a clear case. The admitted facts in the case establish the complainant's right as a partner, and that right continues unless it has been forfeited under the agreement. There is no room here for the application of the equity rule applied by the president of the common pleas, that the allegations of the answer which were responsive to the bill were to be taken as true unless disproved by two witnesses, or by one witness with corroborating circumstances, for all the parts of the bill which relate to the offer or willingness of the complainant to raise money for the firm are in effect only a denial of the existence of any ground of forfeiture. The complainant alleges in his bill that origi-

nally he was a member of the copartnership, and avers that neither by anything that he had done, or omitted to do, had he forfeited his interest, but that he had in all respects conformed to the law of the partnership as contained in the articles. The respondent by his answer says, "True, you were a partner, but you did not perform your covenants and thereby forfeited your right in the firm." Now, to say that because the complainant alleged performance and the respondent denied it, that the denial being responsive to the allegation, therefore the answer established the existence of ground of forfeiture, until disproved, would be to convert an assertion of innocence into the most effectual means of establishing guilt. The *onus probandi* being upon the respondent we are next to inquire whether the evidence makes a clear case in his favor.

It is admitted that the complainant advanced more money than the two thousand dollars mentioned in the agreement, but it is alleged that he did not advance it as promptly as the exigencies of the firm required, and as he was bound to do under the stipulation referred to. It is unnecessary to say whether this allegation is true or not, for even if true it would not subject the complainant to have his interest declared at an end, because the neglect to act until after the whole sum and more had been advanced would clearly amount to a waiver of any right to forfeit for the delay in making advances. Did the complainant refuse to aid in raising money through the means and upon the credit of the firm? To prove that he did the respondent relies upon the testimony of Francis Medlar, Charles Worman and William Kendrick.

The first witness testifies that on the 12th of November, 1852, Silliman showed to Patterson a statement, and asked him for the money due the concern. Patterson refused paying it. Silliman then asked him what part he would pay on it. Patterson replied that he would not pay one cent on it as long as Silliman had anything to do with the concern. The tender was then made, and the notice given or offered heretofore referred to. Charles Worman was present, and his testimony is in substance the same as Medlar's. William Kendrick proves nothing material upon this branch of the case. The evidence of Medlar and Worman falls far short of proving a refusal on the part of Patterson to allow moneys to

be raised upon the joint liability of himself and Silliman. It only establishes the fact that Patterson refused to pay Silliman's claim, or to make further individual advances for firm purposes, and this, under the agreement, was no cause of forfeiture.

It is alleged in the answer that Patterson failed to give his attention to the business of the firm, and also that he used the name of the firm to raise money for his own private purposes; but neither allegation is sustained by proof. The answer further alleges that the complainant declined taking the respondent's machinery and property mentioned in the articles of copartnership, and for proof of this reference is made to the note of 1st November, 1852, signed "Fred." The note reads:

"DEAR SIR:

"I have concluded to decline having anything to do with your engine, or any of the rest of the old truck you had, on the ground of its not being suitable for the purpose. Yours respectfully, "FRED."

If the engine and other property could be advantageously used at the Tuscarora colliery, Silliman had the right to furnish it under the agreement; if it could not, he had no such right. In any event, the note referred to could not prejudice Silliman's legal right; and even if Patterson was mistaken in his allegation that the engine and other property was not fit for use he did not thereby forfeit his right as a partner.

Again, it is alleged by the respondent that the moneys absolutely necessary for the prosecution of the business could not be raised upon the joint responsibility of the firm. Conceding this to be so, it was not, either under the agreement of the parties or by the law of the land, a reason why one partner should declare the interest of the other forfeited.

Upon the whole case, our opinion is that the act of Silliman in declaring the partnership dissolved, and in denying the right of Patterson to participate in the business or in the possession of the property of the firm, and in ejecting him therefrom, was unauthorized and illegal. What, then, is the remedy? To order him simply to be re-instated as a partner would not be an adequate remedy, and would be injurious to the interests of both parties; for it is very clear that they can not act harmoniously, and therefore the relation of partners

ought to be dissolved. The dissolution of the copartnership involves the necessity of an account and the appointment of a receiver to take charge of the partnership effects, pay the debts, and dispose of the partnership property.

Two objections are made by the respondent to a sale of the leasehold interest in the coal mines.

1st. That it is not partnership property, but belongs to the complainant and respondent as tenants in common.

2d. That a sale would forfeit the interest acquired under the lease made by the Kentucky Bank to the parties litigant. To the first objection it is sufficient to say that the articles of copartnership clearly embrace the interest acquired under the lease, which was thereof converted into partnership assets, and became the property of the firm.

As the Kentucky Bank is not a party to this bill, we can not give an opinion which will conclusively settle the question of the effect of a sale, under an order of the court, of the interest of Patterson & Silliman in the coal lease. But as the point is presented, and as it is necessary to pass upon it between these parties, it is proper to say that our present opinion is, that to decree a sale under the prayer in this bill, will not give to the Kentucky Bank the right to declare the lease at an end.

Upon the whole case, we are of opinion that the complainant is entitled to the relief prayed for in this bill.

Reversed and decree in favor of complainant ordered.

SEDGWICK v. DANIELL.

(2 Hurlstone & Norman, 319. Exchequer of Pleas, 1857.)

[1] **Note of sundry partners for benefit of all—Contribution.** Three of the partners in a mining company borrow money on their joint note and the money is used for the benefit of the concern. Two of them paid the note and one of them, who had advanced the share of the third maker, sued such third maker for contribution. *Held*, [2] that it was a transaction independent of the mining partnership, and that the action at law was maintainable.

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[1] *Dickinson* v. *Granger*, 18 Pick. 315.

[2] Another defense was that defendant had lent his name to the note on promise that he should not be called upon to pay it; and at a subsequent trial a jury found for defendant on this question of fact.

Declaration for money paid by the plaintiff for the use of the defendant. Plea, never indebted.

At the trial before WATSON, B., at the London sittings in last Easter term, the following facts appeared: The plaintiff and defendant were shareholders in a joint stock mining company, called "The Camborne Consols Mining Company." Money being required for working the mine, one Tindal, who was also a shareholder in the company, applied to the Royal British Bank for an advance of £500. The bank consented to advance the money on condition that they had, as a security, a promissory note with three makers. The plaintiff and Tindal agreed to sign the note, and they applied to the defendant to become the third maker, promising him, as the defendant alleged, that he should not be called upon to pay it. A joint and several promissory note was accordingly given with three names, and the money received from the bank was applied to the purpose of the mine. It was arranged that the note should be paid, when due, out of the produce of the mine; but it proved unproductive. The note was renewed, and the plaintiff and Tindal subsequently paid the amount, and this action was brought by the plaintiff to recover what he had paid above his share.

It was submitted on behalf of the defendant that this was a partnership transaction in respect of which no action at law could be maintained. The learned judge left it to the jury to say whether the defendant became a party to the note on the understanding that he was not to be liable, and the jury found that question in the negative. His lordship then directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him, if the court should be of opinion that the action was not maintainable.

STAMMERS, in the same term, May 6th, obtained a rule *nisi* accordingly, and also for a new trial on the ground that the verdict was against the evidence.

CREASY now showed cause.—The action is maintainable. This was an independent transaction not connected with the profit and loss of the company. The three persons executed an instrument by which each and all became liable to pay a

certain sum of money, and one having paid the whole amount, he has a right of action against the others for contribution. In *Edgar* v. *Knapp*, 6 Scott N. R. 707, 712, four persons who had acted as directors of a proposed railway company, being sued for the debts contracted on account of the concern, jointly retained an attorney to defend them on their personal responsibility; and it was held that one of the four who had paid the attorney's bill was entitled to sue the others for contribution. There Cresswell, J., in the course of the argument said: "If four individuals make a contract which in its results necessarily involves a liability on each and all of them to pay money, does not each of them give the other authority to pay it on his behalf?" On the same principle it has been held that a part owner of a ship, who, as ship's husband, incurs the expense of the outfit, may sue the other part owners separately for their respective shares of the expense: *Helme* v. *Smith*, 7 Bing. 709. There Park, J., said: "Even in an ordinary partnership, if one of five or six were to advance to each of the others his share of the capital as a loan, he would be entitled to sue him separately; and why not the plaintiff for money he has laid out on his ship?" So here, the money borrowed on the security of the promissory note never became an item in the partnership account, but was a distinct loan by the three shareholders to the company. He also agreed that the verdict was not against the evidence.

STAMMERS, in support of the rule.—The plaintiff and the defendant were partners in a mining company, and such a company is subject to all the incidents of an ordinary trading partnership: *Crawshay* v. *Maule*, 1 Swans. 523; *Jefferys* v. *Smith*, 1 Jac. & W. 298. One of those incidents is, that one partner can not sue another at law for a matter relating to the partnership.

In Story on Partnership, Sec. 219, p. 319, it is said, "It is sometimes laid down by elementary writers, that during the continuance of the partnership an action at law will lie by one partner against the others for moneys advanced, or paid, or contributed, on account of the partnership, or of the debts and obligations incurred thereby. But this doctrine, in the general terms in which it is laid down, is utterly untenable and inconsistent with the rights and duties and relations of

the partners with each other." Also in Collyer on Partnership, p. 190, 2d Ed., it is said: "Upon the whole, it may now be considered to be the better opinion, that in cases of general trading partnership one partner can not, at law, enforce contribution from his copartner for moneys laid out on the partnership account." *Holmes* v. *Higgins*, 1 B. & C. 74, and *Bovill* v. *Hammond*, 6 B. & C. 149, are authorities to the same effect. In *Robson* v. *Curtis*, 1 Stark. 78, the plaintiff had indorsed to the defendant a bill of exchange, which the former received from the drawer in payment for some cattle sold to him by the plaintiff and defendant, who were in the habit of jointly purchasing lots of cattle from the breeders, and selling them in smaller parcels. The defendant indorsed over the bill, and it having been dishonored, he promised that if the plaintiff would take it up, he, the defendant, would pay him half the amount. The defendant having failed to do so, the plaintiff sued him for money paid; but Lord Ellenborough ruled, that as some of the cattle remained unsold, and no account had been settled between the plaintiff and defendant, this transaction was not taken out of the partnership account, and he nonsuited the plaintiff. That was a stronger case than the present, inasmuch as there was an express promise to pay. [MARTIN, B.—That decision is not approved of in Collyer on Partnership, p. 181, 2d Ed.] The reasons for the rule are given by Lord Cottenham in *Richardson* v. *The Bank of England*, 4 Myl. & C. 165, 172. But, indeed, the rule is founded upon a maxim as ancient as any part of the common law, "*Frustra peteret quod mox restituturus esset*," a maxim which was acted on in a case where a villein sought to recover damages against his lord: Jenk. Cent. p. 256, Pl. 49. The rule of law applies, *a fortiori*, where one partner sues another for contribution: *Sadler* v. *Nixon*, 5 B. & Adol. 936. He also argued that the verdict was against evidence.

POLLOCK, C. B.—Two questions have been argued; one of law and the other of fact. The question of law is, whether under the circumstances this claim can be considered as a partnership debt, for if so no action at law can be maintained in respect of it. I am of opinion that the instrument not being signed by all the members of the company, but by three only, this must be considered as a transaction separate and apart from

the partnership. With respect to the question of fact, viz., whether the verdict is against the evidence, I am of opinion that there ought to be a new trial.

MARTIN, B.—I am of the same opinion. There is no doubt about the law in cases of this kind. If three partners agree that each shall bring into the concern £500, that becomes a part of the partnership property; and no action can be maintained in respect of the money brought in by each, for it would be useless for one partner to recover, when, upon taking a general account amongst all the partners, he might be liable to refund. But in this case the transaction is altogether separate from the partnership. Three shareholders agree to become security for money advanced to the company, and which ultimately they are liable to pay. Then they ought to be in the same condition as if each had himself advanced to the company an aliquot portion of the money. If each had done so, he might have recovered against the company the money so advanced. Then the three being liable to pay, the plaintiff, who has paid more than his share, may maintain an action against the defendant for contribution. As to the other point, I agree that there ought to be a new trial.

BRAMWELL, B.—Upon the matter of law I subscribe to Mr. Creasy's argument. If a partner advances money on account of the partnership, he can not recover it in an action against his copartners, for the law will not imply a promise to pay it; and why? because, at the time he made the advance he impliedly undertook that it should remain until an account was taken. But if two or three members of a partnership, not being the whole, think fit to enter into a separate obligation to a third party, upon the security of which he advances money to the partnership, each being liable to pay the whole, and bound to indemnify the others against the payment of more than his share, that can not be considered as a partnership transaction. Here, so soon as the bank advanced the £500 to the company, each of the three parties was entitled to take credit, as against his co-surety, to the extent of one third of £500. Then one of them, having been compelled to pay more than his share, has a right to call upon the others to contribute.

WATSON, B.—I am of the same opinion.

Rule absolute.

BURTON v. WOOKEY.

(6 Maddock, 367. Court of the Vice Chancellor, 1822.)

Bias, against interest. No partner who owes a duty toward another can place himself in a situation which gives him a bias against the discharge of that duty.

[1] **Charging intermediate profit against associate.** A partner may not buy by barter for, and charge cash against, his firm.

The plaintiff and defendant entered into partnership together to deal in *lapis calaminaris*. The defendant, who was a shopkeeper, was to take the active part in the concern, and to purchase the *lapis calaminaris* from the miners in whose neighborhood he lived. Many of the miners were, before the partnership, in the habit of dealing at his shop, and continued so for some years after the partnership, receiving from the defendant ready money for the *lapis calaminaris* and paying for their shop goods afterward as they would have done to any other shopkeeper; but in the year 1817 or 1818, owing, as the defendant alleged, to the distress of the times, a new course of dealing took place between the defendant and the miners; in the place of paying them for the *lapis calaminaris* with money, he paid them with shop goods, and in his account with the plaintiff he charged him as for cash paid to the amount of the price of the goods.

The question was whether he could justify this charge, or whether he must not divide the profit made by him on the sale of the goods with the plaintiff.

THE VICE CHANCELLOR (SIR JOHN LEACH).

It is a maxim of courts of equity that a person who stands in a relation of trust or confidence to another shall not be permitted, in pursuit of his private advantage, to place himself in a situation which gives him a bias against the due discharge of that trust or confidence. The defendant here stood in a relation of trust or confidence toward the plaintiff, which made it his duty to purchase the *lapis calaminaris* at the low-

[1] *Jones* v. *Dexter*, 130 Mas. 380; 39 A. R 459 and note citing ca e, 461.

est possible price. When in the place of purchasing the *lapis calaminaris* he obtained it by barter for his own shop goods, he had a bias against a fair discharge of his duty to the plaintiff. The more goods he gave in barter for the article purchased, the greater was the profit which he derived from the dealing in store goods, and as this profit belonged to him individually, and as the savings by a low price of the article purchased was to be equally divided between him and the plaintiff, he had plainly a bias against the due discharge of his trust or confidence toward the plaintiff. I must therefore decree an account of the profit made by the defendant in his barter of goods, and must declare that the plaintiff is entitled to an equal division of that profit with the plaintiff.

BROWN v. KIDGER ET AL.

(3 Hurlstone & N. 853. Court of Exchequer, 1858.)

[1]**Power of managing partners to borrow and to accept bills.** The four defendants were partners in coal mining. Two of them conducted the business of the colliery. These managing partners borrowed money and accepted a bill of exchange in the name of the firm in settlement of firm debts on which actions had been brought. The partnership deed contained a clause that if any partner should, *for his own use*, accept any bill of exchange, the others might determine his interest in the partnership. *Held*, that the managing partners had power to borrow the money and to bind the firm to the payment of the accepted bill.

The first count of the declaration stated that the plaintiff, by his bill of exchange, now overdue, directed to the defendants under the name and style of the "Peggs Green Colliery Company," required the defendants under such name and style to pay to the plaintiff's order, £260 14*s*., one month after date; and the defendants then accepted the said bill but did not pay the same, and thereupon the same was returned to the plaintiff, who had previously negotiated the same, dishonored, with the expenses thereof, which the plaintiff was compelled to pay. There were also counts for money lent and money paid.

[1] *Ricketts* v. *Bennett*, 11 M. R. 278; *Hawtayne* v. *Bourne*, 1 M. R. 285; *Burmester* v. *Norris*, 3 M. R. 449; *McConnell* v. *Denver*, 11 M. R. 432; *Jones* v. *Clark*, 11 M. R. 473.

The defendants Bostock and Knight, pleaded to the first count, that they did not accept the bill; to the residue of the declaration, never indebted.

An abstract of another plea was delivered, and on application for leave to plead several matters, the learned judge ordered that the defendants be at liberty to plead the above pleas, the plaintiff undertaking that the subject-matter of the other plea, of which an abstract was delivered, might (if necessary) be given in evidence under the first plea. The abstract was as follows: That the bill was accepted by Kidger and Price as agents to the Peggs Green Colliery Company, in which the defendants Bostock and Knight were alleged to be partners, without the knowledge or consent of the defendants Bostock and Knight, for their own private purposes, and not for partnership purposes, and that the partnership never received any value for the same; that the plaintiff is suing as trustee for Kidger and Price, with full notice of the premises.

At the trial before the Lord Chief Baron, at the London sittings after last Trinity term, it appeared that by articles under seal, dated the first of September, 1853, the four defendants. Kidger, Price, Knight and Bostock, agreed to carry on together, as copartners, the business of coal masters, for the purpose of working a coal mine which had been demised to them, situate at Peggs Green, in the county of Leicester. The partnership was to continue for twenty years from the 25th of March, 1853. At a meeting of the partners in October, 1856, it was resolved that Kidger and Price should conduct the business of the colliery, which they accordingly did. In 1857, two actions were brought against the partnership, one by the Midland Railway Company to recover £154 15*s.* 2*d.* for tonnage of coal carried from the colliery to Leicester, and the other by one Worswick, to recover £91 19*s.* 1*d.* for the hire of trucks. Kidger and Price were unable to satisfy these claims, and Knight refused to contribute. Kidger and Price applied to the plaintiff, who was the attorney employed by them to defend these actions, to advance the money, and they engaged that he should be repaid out of the first assets of the partnership which could be collected, and should have a bill of exchange accepted by them on behalf of the

partnership. The plaintiff paid the debt and costs in both actions and drew a bill of exchange, dated the 6th February, 1858, for payment of £264 14*s.* one month after date, which was accepted by Kidger and Price, "pro Peggs Green Colliery Company." On the 25th January, Kidger and Price gave notice of a half-yearly meeting on the 2d February, to provide funds to reimburse the advances they had made in carrying on the works of the company. The meeting was held on that day, when Kidger and Price reported "that since the last half yearly meeting, the Midland Railway Company had commenced an action at law to recover £154 15*s.* 2*d.* for tonnages due from the colliery, and that Mr. W. Worswick had also commenced an action at law to recover the sum of £91 19*s.* for rent or hire of trucks due from the colliery; and that notwithstanding the resources of the colliery did not enable them to meet these demands, Messrs. Kidger and Price, to avoid costs and expenses, raised and paid these debts and the costs of the actions, to which Mr. T. Bostock contributed £37 11*s.* 10*d.* That by the accounts is shown to be due to Messrs. Kidger and Price the sum of £410 12*s.* 10*d.*, in addition to which the sum of £261 19*s.* was due for rent at Michaelmas last, for which provision must be now made, either by an immediate contribution by the partners or by raising money by other means." The following resolution was entered in the minute book: "Resolved, that a contribution by the parties in Peggs Green Colliery, in accordance with their respective shares therein, should be made within three months from this meeting, of £900, and that Messrs. Kidger and Price in the meantime raise, by temporary means, money to meet the necessities of the company in carrying on the partnership undertaking." The partnership deed contained the following clause: "That if any or either of the said partners shall, for his own use, or any other purpose than the immediate use of the said partnership concern, draw, accept, or indorse any bill or bills of exchange or promissory note or notes in the name of the firm, it shall be lawful for all or any of the others of them, at any time within fourteen days after the same shall come to their, his or her knowledge, to give to the party so acting, notice in writing, by leaving the same at his or her last known place of abode, announcing a dissolution of the said copartnership so far as regards the interest of the said party for

whom such notice shall be left, and thereupon the said copartnership, so far as regards the interest of such party therein, shall determine in the same manner as if the whole of the said term of twenty years had expired."

It was objected on behalf of the defendants, that Kidger and Price had no authority to borrow money or accept bills on behalf of the partnership. The learned judge was of opinion that in case of pressure one partner might borrow money for the purpose of paying a partnership debt, and that the clause in this deed of partnership impliedly authorized the partners to accept bills for the use of the partnership; and he left it to the jury to say whether the money was lent on the credit of the partnership. The jury found a verdict for the plaintiff for £260 14*s*., and leave was reserved to the defendants to move to enter a nonsuit.

MACAULEY, in the present term, obtained a rule *nisi* accordingly, on the ground that the case proved by the plaintiff established no liability on the part of the defendants Bostock and Knight, for money lent, or as acceptors of the bill of exchange; or why a new trial should not be had, on the ground that the learned judge ought to have directed the jury that the evidence did not warrant the verdict.

LUSH and G. DENMAN now showed cause.

MACAULAY (BELL with him) in support of the rule.

BRAMWELL, B.—I am of opinion that the rule ought to be discharged. The first question is, whether the two partners had authority to borrow money for the purpose of paying the debts of the partnership; for, if not, the firm are not liable on the bill of exchange given for the money borrowed. I can see nothing in the constitution of this company to induce me to suppose that it was not intended that the ordinary rule should apply; and the partnership deed does not negative the right of one partner to borrow money for partnership purposes. The remaining question is one of fact, viz.: whether the money was lent on the security of the two partners, or of the firm. As to that, the evidence is reconcilable, and it seems to me that the money was lent on the credit of the firm.

WATSON, B.—I am of the same opinion. There are two

points: first, whether the managing partners had authority to borrow money on the credit of the firm; secondly, whether they had power to bind the partnership by accepting bills of exchange. Generally speaking, one partner has power to borrow money for the purpose of carrying on the partnership business. But it may be that the business is to be carried on with ready money only, and that there is no authority in one partner to pledge the credit of the firm. Everything depends on the nature of the partnership. Here the partnership deed contains a clause which impliedly enables any of the partners to accept bills of exchange in the name of the firm, provided they do not, in violation of their duty, accept them for their own use, "or any other purpose than the immediate use of the partnership." What is "the immediate use of the partnership?" Suppose the outlay was so great that they could not meet it, and it was necessary to call all the partners together and get a contribution from each, it would not do for them to stop their works and close their business until the contribution was obtained, and a bill accepted for money borrowed to carry on the business would be a bill for the immediate use of the partnership. Then if one partner may accept a bill in the partnership name, *a fortiori* he may borrow money. Therefore, from this very clause, I infer a power not only to accept bills, but to borrow money for partnership purposes. As to whether the verdict is against the evidence, I do not think that the documents are incompatible with the oral testimony. The resolution means that there are debts to be met, and we have to pay them.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. The first question is, whether the two partners had authority to bind the company. I am of opinion that they had. I do not consider this a mining company as such a company is usually understood, but I look upon it as a trading company; and I think that there is nothing in the partnership deed to restrict the rights which the partners would have as ordinary trading partners. On the contrary, the clause referred to gives an implied authority to any partner to accept bills for partnership purposes. Still the question arises whether there was any evidence for the jury that the money was lent on the credit of the firm. I think there was.

POLLOCK, C. B.—With respect to the question of law, I agree with my learned brothers; the jury have disposed of the question of fact, and I am not dissatisfied with their verdict.

Rule discharged.

BULLARD v. KINNEY ET AL.

(10 California, 60. Supreme Court, 1858.)

[1] **Joint stock company governed by partnership law.** Where there is nothing in the constitution of a joint stock company which regulates the remedies of the shareholders as between themselves, the general law of partnership must govern.

Partner can not sue partner. Where two shareholders in a mining concern sold to the company goods, and afterward, during the existence of the company, sold their stock to A, and assigned their account for goods to B. who sued the company by attachment: *Held*, that such action could not be maintained, there having been no final settlement, no balance struck and no express promise on the part of the individual parties to pay their ascertained proportion.

Reasons for the rule forbidding suit by partner against partner, except in certain restricted cases.

Assignment of account by partner. Where a partner can not sue the company at law, nor maintain attachment, his assignee is in no better situation than the assignor before the assignment.

Appeal from the District Court of the Eleventh Judicial District, County of El Dorado.

This was an action of *assumpsit*, brought by the plaintiff on an account assigned to him by Sotzen and Goodnow, for goods, wares and merchandise sold to the defendants. The defendants composed a joint stock association known as the "Columbus Quartz Mining Company." While Sotzen and Goodnow, merchants and partners, were shareholders in the company, they sold to the company goods, wares and merchandise, to a large amount. They afterward, and during the existence of the company, sold their stock to one White, and assigned their account against the company to plaintiff.

There was nothing in the constitution of the company which

[1] *Uhl* v. *Harvey*, 78 Ind. 26; *Abel* v. *Love*, 11 M. R. 350; *McConnell* v. *Denver*, 11 M. R. 432.

regulated the remedies of the shareholders as between themselves. Nor was there any final settlement of the partnership accounts, or any balance struck, or promise on the part of the other shareholders to pay this account. The plaintiff commenced his suit by attachment against the property of defendants.

The defendants had judgment in the court below, and the plaintiff appealed.

SANDERSON and HEWES, for appellant.

D. K. NEWELL, for respondent.

BURNETT, J., delivered the opinion of the court.

The only question arising in the case is, whether the plaintiff can sue in this form.

There was nothing in the constitution of this company which regulated the remedies of the shareholders as between themselves, and therefore the general law of partnership must prevail: Coll. § 1115. There having been no final settlement of the partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their ascertained portion of this amount to Sotzen and Goodnow, they could not maintain *assumpsit*. As they could not sue it is difficult to see how their assignee could do so. To permit a partner, who has a claim against the firm, and who can not, therefore, sue the firm at law, to avoid this disability by assignment of the debt, would defeat all the substantial reasons upon which this rule is predicated. This rule rests upon three grounds:

1. The technical ground that a man can not at the same time, in the same suit, be both a plaintiff and a defendant.

2. Because it would be useless for one partner to recover that which, upon taking a general account, he might be compelled to refund, and thus a multiplicity of suits be permitted where one would answer.

3. The contrary rule would defeat the equitable right of the other partners to set off their advances against those of plaintiff, and would force them to first pay the amount, and

then rely upon the individual responsibility of the partner for a return of his proportion.

The first ground being merely technical may be considered as not so material under our system of pleading; but the other two grounds are substantial in their character. There is another objection that arises under the attachment law as it then existed. Sotzen and Goodnow could not resort to the harsh remedy by attachment but their assignee could, if he could maintain this suit. Such a remedy was not contemplated by the parties at the date of the transaction, and can not be invoked by the single act of one.

Judgment affirmed.

FIELD, J.—I concur in the judgment.

ABEL v. LOVE & FOWLER.

(17 California, 233. Supreme Court, 1861.)

Action between shareholders in ditch. The defendants collected the rents for the use of water from a ditch which they owned as tenants in common with the plaintiff: *Held*, that the shareholders in the ditch may be regarded as partners entitled to participate in the profits derived from the business of carrying on the ditch, and the money used be considered as money had and received by defendants to the plaintiff's use.

Probate jurisdiction—"Late resident." A petition for letters of administration on an estate, stating that the deceased was "late a resident" of the county, etc., instead of stating that his residence was there "at or immediately preceding his death," in the language of the statute, is sufficient to give jurisdiction.

Public administrator—Letters unnecessary. A public administrator who has been duly authorized to administer upon an estate by the judgment of a court having jurisdiction, may show a grant of administration by producing a copy of the order. It is unnecessary that letters of administration be actually issued to him, at least, a failure to issue the letters will not affect the jurisdiction.

Appeal from the Ninth District.

Suit by plaintiff to recover money charged to have been collected by defendants as rents and profits of one undivided

tenth interest in a water ditch claimed by plaintiff. The complaint avers in substance that plaintiff is owner and entitled to possession of an undivided tenth of a certain water ditch, from Sept. 18, 1858, to August 24, 1859, and hence entitled to receive the rents and profits; that defendants, knowing plaintiff's rights, and being the owners and in possession of other undivided four tenths of the ditch, have assumed control of plaintiff's one tenth, and collected and appropriated to their own use the rents and profits thereof, and refuse to pay the same.

Defendants demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and answered denying generally the allegations of the complaint, and averring, among other things, ownership and possession of the ditch. Demurrer overruled. On the trial it was shown that plaintiff held a claim against one Wheeler, a resident of Shasta county, who died seized of the one tenth interest claimed by plaintiff; that he obtained judgment for the amount against Reed, then administrator of Wheeler's estate; that Reed resigned his office without paying the judgment, and upon the petition of plaintiff as creditor, D. D. Harrill, public administrator, was appointed administrator of the estate; and that Harrill, not having administered, Swasey, his successor in office, on the application of plaintiff, was authorized by the probate court to take possession of the estate, to be disposed of in pursuance of the statute; that Swasey and the probate judge allowed the judgment of plaintiff, and the property in question was sold by Swasey under order of the probate court, plaintiff becoming the purchaser, and receiving a deed Nov. 11, 1858, the sale being confirmed by the court; that Dec. 18, 1858, defendants, being aware of Wheeler's claim to the property and also of plaintiff's judgment and purchase, leased the premises to E. & M., who are in possession, paying rent to defendants. No letters of administration were issued to Reed, Harrill or Swasey.

In tracing title, plaintiff offered in evidence all the proceedings in the Probate Court of Shasta County relative to the estate of Wheeler. Defendants objected on the ground that the petition of Reed for letters does not state facts sufficient to give the probate court jurisdiction. The petition states,

among other things, that "one John H. Wheeler, late of the county of Shasta aforesaid, on or about the twenty-fourth day of July, 1853, departed this life, leaving at the time of his death effects in said county subject to distribution." Objection overruled and evidence admitted.

When plaintiff offered in evidence his petition that Swasey, as public administrator, be authorized to take charge of and administer as administrator *de bonis non* upon Wheeler's estate, defendants objected, on the ground that special letters of administration should have been issued to Swasey. Overruled and evidence admitted. Judgment for plaintiff for the rents and profits.

Defendants appeal.

E. GARTER, for appellants.

R. T. SPRAGUE, for respondent.

BALDWIN, J., delivered the opinion of the court, FIELD, C. J., concurring.

This was a suit to recover money collected by defendants as the rents and profits of one tenth interest in a water ditch. The defendants it seems were, or assumed to be, in possession of this property, claiming an ownership in a portion of the ditch, and collected the rents for the whole, including the share which would fall, on a proper division, to the interest of the plaintiff. The defendants demurred to the complaint. The point is taken here, that the plaintiff, being a tenant in common, can not maintain this action to recover his share of the rents and profits of his co-tenant; and *Pico* v. *Columbet*, 12 Cal. 420, is cited to sustain this proposition. But that case embodies a different principle. It has no application to the case of money received by one tenant in common from sales of water or profits derived from the business of a ditch or mine. Indeed, these operations may be regarded as partnerships, so far as this matter is concerned, the shareholders being regarded as partners entitled to participate in the profits derived from the business of carrying on a ditch or the sales of water. In the case of *Goodenow* v. *Ewer*, 16 Cal.

461, we had occasion to review the case of *Pico* v. *Columbet*, and need only refer to the opinion there to show the true construction of the former case.

The facts here show that this ditch property was rented by the defendants, and that a sum of money was realized by the defendants from the lease. For so much of this sum as falls to the share of the plaintiff the defendants are liable in this action; the money may be considered as money had and received by defendants to the plaintiff's use.

The other points made touch the question of the plaintiff's title to this share of the ditch property. He deduces his title from a sale made by a public administrator under order of the probate court. To the proceedings of that court, as evidencing the title, two objections are made: first, that the court of probate had no jurisdiction, as in the petition for an order granting administration on the estate of the decedent, it does not appear that his last place of residence was Shasta county. The phrase used in this connection is, that the decedent was "late of," etc. But this point seems to be disposed of in the case of *Beckett* v. *Selover*, 7 Cal. 233, and we think that the decision on this question ought not to be disturbed.

It is next objected that letters of administration were not issued to the public administrator. But if the actual issuance of these letters be necessary in order to authenticate the title of an administrator, in any proceeding of this sort, after a grant of administration has been regularly made, we think there is no necessity for such issuance to a public administrator, who has been duly authorized to administer by the judgment of a court having jurisdiction. The general language in *Rogers* v. *Hoberlein*, 11 Cal. 120, was not designed to decide more than that the public administrator must show *a grant* of administration upon the particular estate; but this grant may be shown, in the case of public administrators, by the production of the order or a copy. At all events the mere failure to issue the letters does not affect the jurisdiction of the court.

The point as to the sufficiency of the deed is not well taken.

Judgment affirmed.

BRADBURY v. BARNES ET AL.

(19 California, 120. Supreme Court, 1861.)

Partner may bid at sale of partner's interest. There is no rule of law preventing, under ordinary circumstances, a partner from purchasing the interest of his copartner when exposed to public sale.

No fiduciary relation in such case. The rule controlling action of trustee toward his beneficiary does not apply against such purchase.

Facts taking case out of the general rule. But where, while he has in his hands large funds of the company, he causes to be bought in, in the name of third parties, judgments against the company or a tax title, he will be presumed to have so bought to protect the company, and his associates are bound to him in contribution only.

Appeal from the Seventeenth District.

Bill by one member of "The American Quartz Mining Company" against his co-members and others, for dissolution and account, and for other purposes. The business of the company was to extract gold from quartz rock. The case was tried by the court, and the following facts found, to wit: The property of the company consists of a quartz mill, lead and ditch in Sierra county, the business of the company being transacted and its books kept by a president, secretary and treasurer. In September, 1859, a quantity of quartz rock belonging to the company was crushed in the company's mill, and yielded $7,073.98, no part of which was credited on the books of the company, but the whole was received and appropriated by defendant Barnes, none of it going to the other members, or for their debts, except as hereinafter mentioned. October 7, 1859, one Andrews obtained judgment against the company for $2,588 and $24.68 costs, and under execution thereon the sheriff sold the property of the company, on the 29th of the same month, to one Crafts, for $2,756.02, and executed to him a certificate of sale, which he at once assigned to defendant Barnes, who furnished the money bid according to previous arrangement between them. November 8, 1859, one Cunningham obtained judgment against the company for $2,310.97 and $49 costs, and under it the sheriff,

[1] *Perens* v. *Johnson*, 3 Sm. & G. 419.

December 3, 1859, sold the same property to Crafts, and executed to him a certificate of sale, which he, on the same day, assigned to Barnes. Crafts bought the demand of Cunningham before judgment for $2,254 furnished by Barnes, who supposed the demand to be in judgment. The sheriff also sold the property for the State and county tax of 1859 to one Ellis, who received a certificate of sale, and subsequently sold and assigned the same to Barnes for $119. The company is in debt, but to whom or in what amount does not appear. All parties interested desire the judicial dissolution of the company.

On the foregoing facts, the court below concluded in law, "that defendant Barnes, having funds of the partnership in his hands, made the purchase of the certificates of sale of the company's property, and the interest therein conveyed, as trustee for the partnership, and therefore must be restrained from transferring or disposing of the same; that defendant White, the sheriff, should be restrained from making deeds for the property described in said certificates, and that said certificates must be canceled; that an accounting must be had between the partners, and between the partnership and third persons, which will be taken by the receiver and reported to this court; that in the accounting between the partners defendant Barnes should be charged with the sum of $7,073.98, received by him as proceeds of the said quartz rock, and credited with the sums paid for said sheriff's certificates of sale; that said partnership must be dissolved; that the partnership property must be sold by the sheriff in the same manner and upon the same notice as is required upon sales of real property under execution at law, and the proceeds paid into court to be applied, 1st, to the payment of the costs herein, including the amount allowed and to be allowed to the receiver; 2d, to the payment of the liabilities of the partnership of third persons; 3d, to the payment of the debts due from the partnership to its individual members; 4th, the remainder to be divided among the partners in proportion to the shares or interests by them respectively held in the partnership."

Judgment accordingly. Defendants appeal.

McCONNELL & GARBER, for appellants.

ALONZO PLATT, for respondent.

BALDWIN, J. delivered the opinion of the court, COPE, J. concurring.

There can be no doubt that one partner may purchase with his own funds and on his own account the interest of his co-partner in real estate at public sale, if there be no circumstances of fraud or of a trust apart from this relation, and, so purchasing, hold the property as a stranger might. It is true that partners occupy confidential relations toward each other, but this is in respect to the firm business; but this relation does not forbid one from buying of another, when both have an equal opportunity and means of knowing the value of the property and its condition. The fact that the sheriff's sale is public and open is itself *prima facie* proof that no advantage is taken; and no reasons of policy exist to restrain bidding by other partners than the defendant, and who would be more disposed to bid, probably, than strangers. If associates in a mining claim are to be regarded as general partners, a point which we do not decide, still we do not think the rule applicable to trustees and *cestuis que trust*, guardian and ward, which qualifies the right of purchase by the trustee of the *cestui que trust*, can be held to apply. Generally, one partner has a right to buy the whole or a portion of the interest of his associate at private sale as he might purchase of a stranger, and we can see nothing which should deny or qualify this right in the fact that the sale is made through the instrumentality of the officer acting in this respect for the partner: *Gunter* v. *Laffan*, 7 Cal. 588.

But this record presents a different case. The findings of the court are that the plaintiff received some $7,000 of money belonging to the company, and while he had this money in his hands bought up some judgments against the company, using the name of another party, and also a tax title in the same way. This conduct would be grossly inequitable. The charitable inference would seem to be that he made this purchase for the benefit of the company, and therefore, if the company is willing to affirm it as done for the benefit of the concern, the amount of the money paid should be credited to Barnes, on

his indebtedness, and the title go to or remain in the company, unaffected by this arrangement. If Barnes paid the judgment against the company, he being one, he would be entitled to recover of his associates contribution for their proportion, but he could not make this payment through the process of an assignment and then enforce the judgment against the company by selling out the property and buying it in, especially if he had in his hands at this time money of the company to a larger amount than that paid by him to take up the judgment. We have looked over the proofs and do not feel disposed to disturb the finding. The decree for the sale of the property seems premature. It is more regular and better that the account should be first taken, showing how the concern stands, what is due and what the assets, before the property is ordered to be sold.

The decree will be modified in this respect, and is affirmed otherwise. The cause is remanded for further proceedings. Each party to pay his own costs in this court.

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[1] BURDON v. BARKUS.

(4 De Gex, Fisher & Jones, 42. High Court of Chancery, 1862.)

Lessee, taking partner, allowed to dissolve at will after accounting. Plaintiff, being the lessee of certain coal seams, worked the upper seams under a partnership arrangement with defendant; and the upper seams becoming worked out, defendant proceeded with plaintiff's sanction to sink a pit to seams lying below, for which work money was borrowed on the firm credit and the expenses were paid and the loan refunded out of partnership funds. When the new pit was finished disputes arose and plaintiff gave notice of dissolution. Defendant insisted that the partnership was to continue during the entire lease, which plaintiff denied. *Held*, that the burden of proving that more than a partnership at will existed rested upon the defendant, and that in the absence of such proof the plaintiff was entitled to dissolve at pleasure, and that defendant could claim no interest in the seams of coal, but that an accounting had been rightly directed in respect to expenditures already made in sinking the new pit.

This was an appeal by the defendant from a decree of Vice-Chancellor STUART.

[1] *Crawshay* v. *Maule*, 11 M. R. 223.

In and before the year 1845 the plaintiff was lessee under Lord Ravensworth, of the Team Colliery, at a dead rent of £2,000, for which he was entitled to take 1,200 tons of coal from the lower seams and 210 from the upper; a tentale rent, or royalty, being chargeable for over workings at 25*s.* per ton from the lower seams and 15*s.* per ton from the upper. This lease would have expired in 1852. In 1849 a renewed lease was granted to the plaintiff for twenty-five years from 1st January, 1849. The plaintiff had continuously worked the lower seams, but the working of the upper had, before 1845, been abandoned as unprofitable. Neither of the leases included fire clay or ironstone, but it was customary for the lessees to work them, paying a rent which was afterward agreed on with the lessor.

In 1845 the defendant was colliery agent to the plaintiff, and in that year a verbal agreement was entered into between them for working the upper seams and the ironstone and fire clay in partnership. One of the questions in the cause was whether this partnership was to last during the whole term; but it is sufficient to say that the court did not consider that an agreement to that effect was proved.

About the year 1857 the coal in work in the upper seams being nearly exhausted, the defendant, having the management of the concern, proceeded to sink a new pit called The Meadow Pit, for the purpose of reaching other coal. Moneys were borrowed for the purpose of sinking this pit, and profits of the partnership colliery were applied in sinking it, and in payment of the moneys borrowed for that purpose. The plaintiff was fully aware of the pit being in the course of being sunk, and frequently saw the work during its progress; it was not shown that he ever made any objection to it, and the court considered the effect of the circumstances to be that he sanctioned it. This pit was finished, or nearly so, when the bill was filed.

Disputes having arisen between the parties, the plaintiff, on the 13th of August, 1858, served the defendant with a notice to dissolve the partnership, which notice the defendant refused to accept, insisting that the partnership was to continue as long as the lease. On the 24th of August the plaintiff filed his bill for a dissolution.

On the 13th of December, 1861, Vice-Chancellor STUART made a decree which was in part to the following effect:

Declare the partnership desolved from the date of the decree.

Declare that the defendant is not entitled to any interest in the seams of coal comprised in the lease of 13th May, 1849.

Order the following accounts and inquiries:

1. An account of all dealings and transactions between the plaintiff and the defendant as copartners.

2. An account of the credits, property and effects of and now belonging to the said copartnership.

3. An inquiry whether, having regard to the terms of the partnership and to the purposes for which the works at the pit called The Meadow Pit were erected, made and formed, and are now used and capable of being used, and the circumstances under which the expenses of the said works were discharged and defrayed, any and what sum ought to be allowed in respect of such expenses.

4. An inquiry whether, having regard to the state of the stock and plant of the said partnership and to the purposes for which it is capable of being profitably used by the plaintiff, the same ought to be valued as the stock and plant of a going concern, or on any and what other footing; and it is ordered that the same be valued according to the result of such inquiry.

Adjourn further consideration.

Mr. BACON and Mr. MARTIN, for the plaintiff, in support of the decree.

Mr. MALINS and Mr. HOBHOUSE, for the defendant.

The Lord Justice TURNER, after stating at length the cases made by the pleadings, and stating the decree, proceeded as follows:

The defendant has appealed from this decree, and we have now to dispose of the appeal. In proceeding to do so, I think it right in the first place to observe that, in my opinion, the vice-chancellor's decree was well calculated to do substantial justice between the parties, and that both of them would, in

my judgment, have done well to abide by it; but as they have not thought proper to do so, there is no other course open to us than to dispose of the case according to what, in our judgment, are the strict legal rights of the parties. In determining those rights the first question is, what were the terms of the partnership agreed upon between these parties for working these upper seams, for it is not disputed that there was a partnership agreed upon between them for that purpose. The parties are, however, in direct conflict as to the terms of the partnership, the plaintiff alleging that there never was any agreement for partnership otherwise than at will, and the defendant alleging that there was an agreement for working in partnership during the whole term of the plaintiff's interest in the seams under his then present or any future lease. It will be sufficient, however, to consider whether the agreement as alleged by the defendant is proved, for, if not, the plaintiff must, it would seem, have been at liberty to dissolve the partnership. The Statute of Frauds is relied upon by the plaintiff in answer to the defendant's case; but whatever the agreement may have been, it has been part performed, and we are bound therefore, as far as may be possible, to ascertain what the agreement was. In considering that question it is to be observed that the *onus probandi* rests upon the defendant, not only because the agreement is set up by him, but because the plaintiff has the legal interest in these seams, and the effect of the agreement alleged being to constitute the plaintiff a trustee for the defendant, it must, of course, rest upon the defendant to prove that trust. Whether in strictness he ought to be permitted to adduce and avail himself of such proof without having filed a cross-bill to assert the title so alleged by him, I do not stop to consider, the plaintiff not having insisted upon that objection; but I think that the plaintiff must at all events be considered to stand in the same position as he would have stood in if a cross-bill had been filed, and to be entitled, therefore, to all the benefit to which he would have been entitled if what is contained in his affidavits had been stated in an answer to such a bill. Looking, then, at this part of the case, with reference to these considerations, how does it stand? The defendant's case rests primarily upon the statements contained in his answer and affidavit, but these statements are met by counter statements not

less positive or less precise, contained in the affidavits of the plaintiff, and neither of the parties has told us what actually passed at the time when the agreement for the partnership was entered into. We have here, therefore, nothing more than positive assertion on the one side and positive denial on the other, and looking at the case with reference to its position, if a cross-bill had been filed, of course the assertion could not prevail against the denial. (His lordship then adverted to some parts of the evidence tending to show that the parties had not proceeded on the footing of the partnership being one co-extensive with the duration of the lease.) I entirely agree with the vice-chancellor, therefore, that this partnership was dissoluble by the plaintiff, and that it has been well dissolved, and the parties have agreed that the dissolution shall take effect as from the date of the decree. I think that the declaration to that effect is correct. There follows then the declaration that the defendant is not entitled to any interest in the seams, and I think that this declaration is correct also; there being, as it seems to me, no foundation for any claim on the part of the defendant to any such interest other than by virtue of the partnership agreement as alleged by him, but which agreement he has failed to prove. The case of *Jackson* v. *Jackson*, 9 Ves. 591, was referred to on the part of the defendant in support of his claim to a share of the colliery, but it does not seem to me to apply to the present case. The property in that case had originally belonged to both sons in joint tenancy, but here the defendant had originally no interest in the property.

The partnership accounts then follow as of course, and there remain to be considered only the special inquiries directed by the decree. (His lordship then disposed of an inquiry as to a tentale rent which turned on special circumstances.)

The next inquiry to be considered is the inquiry as to the valuation of the stock and plant, which is objected to on both sides; by the defendant as importing that the stock is to be valued, by the plaintiff as importing that it may be valued as the stock of a going concern. I think that both of these objections are well grounded. There was no agreement between these parties for the stock and plant being taken by either party at a valuation on the termination of the partnership, and in the absence of such an agreement a partner can not, as

I conceive, be compelled to take, nor can he compel his co-partner to take the partnership stock at a valuation. Each is entitled to have the value ascertained by sale, and as to the defendant's claim to have the stock dealt with as the stock of a going concern, I do not see how it can be maintained, for the plaintiff is certainly not bound to continue the concern. I think, therefore, this inquiry should be struck out of the decree.

The remaining inquiry is objected to by the plaintiff to whom the appeal has, of course, opened the objection. The inquiry is in these terms: An inquiry whether, having regard to the terms of the partnership and to the purposes for which the works at the pit, called the Meadow Pit, were erected, made and formed, and are now used and capable of being used, and the circumstances under which the expenses of the said works were discharged and defrayed, any and what sum ought to be allowed in respect of such expenses.

This inquiry seems to me to involve considerations of great importance. It has indeed, from the first, struck my mind as opening the most difficult question in the cause. It arises thus: The coal in work being exhausted, or nearly exhausted, the defendant, having the management of the concern, proceeded to sink the Meadow Pit for the purpose of reaching other coal. Moneys were borrowed for the purpose of sinking this pit, and profits of the colliery, both before and since the pit was sunk, had been applied in sinking it or in payment of the moneys borrowed for that purpose. The plaintiff was fully aware of the pit being in the course of being sunk, and constantly saw the work during its progress, and it does not appear that he made any objection to it. Upon the evidence before us he must, too, as I think, be taken to have been cognizant of moneys having been borrowed for the work; for it is sworn on the part of the defendant that he saw the pass-book, and he goes no further than to say that he has no recollection of having seen it. He must be taken, therefore, to have concurred in the sinking of this pit, and in profits of the concern being applied for that purpose. Then when the pit is completed, or nearly completed, he gives notice to dissolve the partnership, and the effect of the dissolution is that all the benefit to be derived from the pit will belong to him, and the

defendant will lose all his share of the profit which has been expended in making the pit. It is to meet this manifest injustice the inquiry we are now considering has been directed, and in my opinion has been rightly directed. This is not the case of a mere tenant at will laying out money on the land which he occupies; it is not even the case of an ordinary partnership carried on upon property belonging to one of the partners, and of the partnership profits being laid out upon the property. In such cases the expenditure is not necessary, but is voluntary, and the party who makes or concurs in the expenditure, knowing the limit of his interest, may well be said to do so at his own peril. But this is a case of a partnership for working a mine, in which case, if the partnership is to continue at all, the expenditure is necessary and not voluntary; and it can hardly be that where money is necessarily expended for the benefit of a partnership, the partner expending it is not entitled to be repaid out of the partnership assets. It is true that, expenditure being out of the partnership profits, it falls upon the plaintiff no less than upon the defendant, and if, therefore, no profit can result to the defendant, it may not be just that he should be charged with it; but the inquiry leaves this question open. According to the Roman law, the state of circumstances which here exists might, and probably would, have prevented the dissolution of the partnership; but our law certainly has not gone to that length. It leaves either partner at liberty to dissolve where the partnership is not for a definite period, but in giving effect to the dissolution it deals with the case according to what is just and equitable between the parties. It has indeed refused to interfere with the legal rights of the parties where there has been no fraud, as in *Akhurst* v. *Jackson*, 1 Sw. 85, but it has exercised a wide discretion in these cases at all events as to what shall be considered as fraud. In *Bury* v. *Allen*, 1 Coll. 589, where there was an agreement for a partnership for a term in consideration of a premium, of which part was paid and part to be paid upon the execution of the partnership deed, and the partnership had been commenced although the deed had not been executed, the partnership having been dissolved in consequence of a quarrel between the parties, the court held the partner who in part paid the premium and had afterward been excluded from

the business to be entitled in the partnership accounts to credit for so much of the premium as had not been compensated by the period for which the partnership had lasted. And in *Featherstonhaugh* v. *Turner*, 25 Beav. 382, it was held by the present master of the rolls that a person selling a share in his business and becoming a partner with the purchaser for an indefinite period, would not be permitted by this court to dissolve the partnership immediately and retain the premium; that he might indeed dissolve the partnership, but that he would be compelled to repay the consideration. The principle of these cases seems to me to reach this case, more especially having regard to what was referred to in the argument —the general doctrine of this court with reference to parties standing by and encouraging expenditure. I think, therefore, that this inquiry is in substance right, but as the details of it were not discussed in the argument we ought, I think, to hear the parties upon them if they desire it.

The Lord Justice Knight BRUCE concurred.

MCKNIGHT v. RATCLIFF ET AL.

(44 Pennsylvania State, 156. Supreme Court, 1863.)

Instructions correct in principle but not pertinent. Where propositions embodied in points propounded to the court are true as general principles, they should not be negatived without qualification; but if deemed inapplicable to the circumstances of the case, the court should refuse on that ground to charge as requested.

[1] **Liability of general partners for trespass of employes.** Partners are liable for a trespass by themselves or their agents, employes or servants in the legitimate conduct of the partnership business; or if the trespass be done by their agents or workmen acting within the scope of their authority, or while in the employment of the firm.

A special partner is not so liable (under limited partnership act); facts considered not sufficient to change a special into a general partner.

[2] **Flooding one mine to save another.** Where defendants, operating a coal vein, permitted plaintiffs, working on the same vein at a lower water level, to use a gangway belonging to defendants, which gangway connected the two workings, and where, upon the case of a freshet, defendants constructed a dam which diverted the water which threatened to come into their own workings, so as to necessarily enter the plaint-

[1] *Tucker* v. *Cole*, 54 Wis. 539; *Ashworth* v. *Stanwix*, 9 M. R. 674.
[2] *Wolf* v. *St. Louis Water Co.*, 10 M. R. 653.

iffs' workings through this gangway: *Held*, that the act was one of willfulness, and not of negligence; that evidence of counter negligence was inadmissible, and that the user of the gangway did not affect the relations of the parties.

Idem—The measure of damages was the actual injury sustained in delay, loss of time, damage to machinery, etc., and if the mine was irreclaimable, then the value of the estate and property; but merely speculative profits, supposed to have been lost, can not be included; it was, therefore, error to instruct the jury that "if the mine was rendered entirely useless then the profits that might have been made out of the coal would be a fair basis for estimating damages."

Defendant misled by plaintiff's opinions. Where a point was presented by defendants, to the effect that if the plaintiffs had notified and informed the defendants that the water would escape before it could damage them, then any damages resulted from their own misrepresentations, for which they could not recover—it should have been affirmed, referring the special circumstances of the case to the jury.

Error to the Common Pleas of Carbon County.

This was an action of trespass on the case by Robert Ratcliff, John Johnson and George Johnson against John McClintock, John W. McKnight and John L. McKnight.

The plaintiffs averred in their declaration that they were lessees of certain collieries in Banks township, Carbon county, with the right to enjoy and work the same without any interruption thereof by the damming or obstruction in the flow of a stream called Beaver creek, etc. But that defendants, well knowing, etc., but continuing, etc., did wrongfully and injuriously dam, fill up, obstruct, and impede by stones, t mbers, and other materials, the channel of said stream—divert and change its course in and upon the said collieries, coal mines, works, and premises, by reason whereof they were filled up inundated, destroyed, and rendered useless for the space of four months, causing plaintiffs great labor and expense in removing the water, and depriving them of the use of said mines and the profits thereof, etc.

To this John McClintock and John W. McKnight jointly pleaded not guilty; which plea was also subsequently pleaded by John L. McKnight, who appeared by other counsel.

John McClintock died after suit brought and before the trial.

The plaintiffs below, who were partners, were lessees and

occupants of certain coal mines known as the Stafford Colliery, and the defendants below, who were also partners under the limited partnership law, were lessees and occupants of certain other mines known as the Beaver Meadow Mines. The mines of both parties adjoined each other, and some of the veins of coal extended continuously through the premises of both parties. Prior to the time when plaintiffs made their lease, a vein of coal in the ground occupied by the defendants had been worked beyond their boundary line, a short distance into the premises subsequently occupied by the plaintiffs. This appears to have been done with permission of the plaintiffs' lessor, to whom defendants paid rent for the coal thus mined. Thus an open gangway was made by which there was free inter-communication between the mines of the two parties, and the plaintiffs' premises were in this condition when they made their lease and went into possession as lessees. After going into possession they worked the same vein by directly continuing the former working and without having any barrier or pillar of coal, as was testified to be the custom, for the purpose of preventing the influx or efflux of water from one mine to the other. The water level of plaintiffs' mine was higher than that of defendants' mine, so that the effect of not leaving the usual barrier or pillar was that the water would be drained from the plaintiffs' working into that of the defendants. That particular working of the defendants which communicated with the gangway of the plaintiffs terminated in a slope called No. 9. This was an abandoned opening from which the coal had been worked out, and the defendants, as was shown in the testimony to be usual in the case of abandoned openings, allowed the water to collect and remain in it.

On the night of a Saturday in the early part of June, 1855, a freshet occurred in that neighborhood, and the channels of the small tributaries of the creek became filled. One of these tributaries ran across the grounds of the defendants, and upon and over the surface of the workings connected with defendants' slope No. 7, at which they were then working. The water began to break through the surface of the ground into Nos. 5 and 7, and in order to prevent such damage a gang of miners living in the immediate vicinity, acting under the

agent of defendants, undertook to modify the direction of the stream. They accordingly threw up a dam, which directed the water across the ground used by the defendants for stacking coal. On the morning of the following Sunday, about eight o'clock, a man named Brader, and others, made another dam throwing the water in another direction. Subsequently, in the forenoon of the same day, Reynolds, the superintendent of plaintiffs' mines, went over to the locality, and with some workmen destroyed the dam that he found there, and erected another, giving the water another direction. Still subsequently to this last change, Brader went up to the mines a second time, and finding that the dam he had erected had been taken away and another one substituted, he in turn took away the latter and restored the one he had first put there. Same day John W. McKnight, one of the defendants, an acting partner of the firm, came upon the ground, but he took no part whatever in the matter, gave no orders or directions, and went away. The allegation of the plaintiff on the trial was that a trespass was committed by John W. McKnight, which is imputable to the entire firm to which he belonged. John L. McKnight was the limited partner of the firm; but it was alleged that, by reason of his subsequent acts, he had rendered himself liable as a general partner, and the evidence, answers to points, and charge of the court on this subject, constitute part of the cause. John L. McKnight resides in the State of New Jersey, and was in that State when this occurrence took place. On the trial, E. M. Budd was called as a witness for plaintiffs, for the purpose ef proving the nature of the partnership existing between McClintock and the Messrs. McKnight, and after testifying to the delivery of a note to McClintock & McKnight for coal, which they were to deliver to the witness, and which McClintock said John L. McKnight (whom he had sometimes met in the store of the firm) would make all right, plaintiffs' counsel proposed to ask the witness if "McClintock said that John L. McKnight had said that he would attend to the note." This was objected to by the defendants but admitted by the court, and constituted the only assignment of error on the subject of the admission or ejection of testimony. The following points were submitted by plaintiffs below:

1. That the act of assembly relating to limited partnerships has not been complied with by the defendants in the drawing, recording, and notice by publication of the certificate given in evidence in this case.

2. That if John L. McKnight has transacted any business for said partnership, or has been employed for that purpose as agent, attorney, or otherwise, he has rendered himself liable as a general partner.

3. The restriction of the liability of a limited partner under the act of assembly of March 21, 1836, to the funds contributed by him to the common stock, is confined to debts contracted by said partnership, and does not apply to cases of torts committed by the agents or servants of the partners as owners of property, or by agents or servants in the conduct of the business of the firm.

4. If the defendants are liable for the original diversion of the water into and upon the property of the plaintiffs, and a dam was erected at an intermediate point protecting that property, which was afterward removed, whereby the water again flowed where the servants of the defendants had originally turned it, and such erection and removal were not made by the parties or either of them, the defendants are as much liable for the damage done by the water after the removal of such dam as they would have been before its erection.

The defendants' counsel also submitted the following points:

1. One copartner is not responsible for a willful tort committed by another; nor is a firm responsible for the willful tort of an agent or servant of the firm.

2. The declaration charges the defendants with committing a willful tort. If, from the evidence, it appears that the alleged tort was committed by a servant of the firm at his own instance, the firm is not liable; or if so committed solely by one or more members of the firm, the remaining members will not be liable.

3. The defendants are not liable in this action merely because they are copartners, but can only be made liable upon proof of actual participation in the alleged trespass.

4. The defendants are charged in their individual capacity as joint trespassers, and if one or more of the defendants did

not order or procure the alleged trespass to be committed, or assent directly thereto at the time, there can be no recovery against such.

5. If the defendant, John L. McKnight, did not order or procure the act to be done, and was absent when it occurred, and did not assent thereto at the time or subsequently, he can not be held liable in this action.

6. If the copartnership of the defendants was a limited copartnership, and the defendant, John L. McKnight, was a special partner, he is not liable for the act now complained of though committed by the general partners, and there can be no recovery against him in this action.

7. The evidence shows that the defendants constituted a limited copartnership, under the act of assembly, and that John L. McKnight, at the time of the alleged trespass, was a special and not a general partner, and that he can not, therefore, be held liable.

8. There is no testimony of any act alleged to have been done by John L. McKnight which is beyond the limit of his right and authority as a limited partner, to examine, from time to time, into the state and progress of the partnership concerns, and to advise as to their management.

9. There is no evidence which, in point of law, makes John L. McKnight liable in this action.

10. If the jury believe that the act or default of the plaintiffs, or their unskillful mining, contributed to the happening of the occurrence, or the production of the damage or injury complained of, the plaintiffs can not recover.

11. If the plaintiffs, in conducting their mining operations, chose to connect their works with those of the defendants, and could, but did not, interpose any barrier between the respective workings, or chose to extend or work their slope below the water level from the top of defendants' shaft, they became subject to all the risks and hazards thereby occasioned, and to the effects of such rights and incidents as would attach to the defendants' dominion over and use of their own property.

12. The defendants, in order to protect a more valuable mining operation belonging to them, would have a right either to permit the drainage water of their mines to collect in the abandoned shaft No. 9, or for the same purpose to di-

rect the waters, suddenly accumulated in a freshet, into that shaft; and if the plaintiffs, from economy, or their own convenience or otherwise, had connected their workings with defendants' workings, or allowed such a connection to continue after leasing their premises, without interposing the usual barriers to inter-communication between the workings, they have no legal right to compensation for injury thereby occasioned.

13. If the plaintiffs had notified or informed the defendants that water would flow out from the top of the shaft No. 9 before it would damage the plaintiffs' mines, and they, the plaintiffs, had acted upon such belief, and had led the defendants so to believe, and the defendants, in good faith, acted upon such statement of the plaintiffs, the latter are estopped from treating such act as a trespass, or from recovering damages because the defendants treated their statement as true.

14. It was the duty of the plaintiffs to leave a sufficient barrier to protect their workings against the influx of water; and if they neglected so to do, and this neglect led to or contributed to the happening of the injury or the extent of the damage, they can not recover; nor can the plaintiffs recover if the rules of good mining and the custom of miners require such a barrier to be left.

The court below charged the jury as follows:

"The 1st and 3d of plaintiffs' points are answered in the negative. The 2d and 4th are answered in the affirmative. The 1st, 2d, 3d, 5th, 7th, 8th, 9th, 11th, 12th, 13th and 14th of the defendants' points are answered in the negative. The 4th, 6th and 10th are answered in the affirmative.

"In answering the points placed before me I have mainly declared the law of the case. The action is trespass, and a tort is complained of. The defendants are sued as individuals, not as partners, and the suit is well brought in that form. The evidence of a partnership has been given for the purpose of connecting the defendants with the tort complained of. If they were not present and participating in the trespass, it was competent to show that it was done by their direction or procurement.

["If the stream of water was diverted from its natural or accustomed channel and turned upon the premises of the

plaintiffs, a trespass was committed. The plaintiffs' rights under ground and in their mines, were just as secure from such a trespass as their property above ground. Suppose the water had been turned into the Stafford mines at the top of the slope, and the mine filled, who would have questioned that a trespass had been committed? Does it alter the case because another opening was found by which the water could be sent to the same spot, and work the very same injury?] The plaintiffs were in the lawful possession of their own mine. They were not bound to purchase a pump from the defendants and hold it in readiness to protect their works against the wrongful act of any one. They were not bound to make a water level, ascertain and inform an adjoining operator of their own rights, and caution them against an infringement. Nor were they bound upon their own land to leave a pillar of coal to mark the division between the two mines. This argument might have been used with much more force, however, if the injury had resulted from a natural or ordinary accumulation of water. Such was not the case in this instance. The injury was done by the act of somebody. The water would not have flowed into the plaintiffs' mines if let alone, and no one had the right to divert it in such manner as to injure another.

["It is further contended that a license was given to defendants to fill the old shaft with water, by these plaintiffs, and a loose conversation between these parties in reference to the height the water might rise in the abandoned shaft, without injury, is relied on to establish that fact. If you believe all the evidence on that subject, it does not amount to a license.]

"Partners are liable for a trespass committed by themselves or their agents, employes or servants, in the legitimate conduct of their partnership business. If it be done by themselves, or under their immediate direction, there can be no doubt about it. If it be done by the direction of their authorized agent, acting within the scope of his power as such, it is the act of the firm or of the partners. If it be done by the workmen, while in the employ of the firm, they furnish the force that commits the tort. If not partners, and they directed and procured the act to be done, they are jointly liable, and their acts and declarations would be evidence

against them. What can it matter whether the principals set the men to work who did the act, or authorized their agent to do it? If, as partners, they authorized the act, they jointly authorized it. If they subsequently approved or ratified it, it is evidence tending to show that it was done with their consent and approbation. Hard indeed would it be if such was not the law. An individual or firm or corporation, finding that a wrongful act would result to their own advantage, might employ an irresponsible person to perform it, by less inducement than the profit to be derived from it. Thus they might ruin a neighbor, pocket the ill-gotten gain, and escape any responsibility. Such is not the law.

"If John L. McKnight was a general partner in the firm of McClintock & McKnight, and that firm, in the conduct of their legitimate partnership business, committed a trespass upon the plaintiff, he is liable.

"If he was a limited partner under the act of assembly in relation to limited partnership, he is not liable, and he was at the time either a general or limited partner.

"Was he a limited partner? It is contended that the act of assembly on that subject, if not strictly, has been substantially complied with. Although the question is not free from doubt in my own mind, the jury are instructed that the law has been complied with, and that John L. McKnight started with the firm as a limited partner. If he continued until after the cause of action in this case originated, to comply with the law under which he connected himself with the firm, his relation to it was not changed. But it is alleged that John L. McKnight by his own acts rendered himself a general partner with McClintock and McKnight, the other members of the firm. He had the right, from time to time, to examine into the state and progress of the partnership concerns. He had a right to be at the office in Philadelphia, at the mines, and in the store. He had a right to examine the books and papers, to see how the work was progressing, and to consult with his partners in reference to it. He had the right to make inquiries of the agents and clerks in reference to the business. He could buy coal or anything else from the firm, or might sell to the firm without any violation of the act of assembly. But he had no right to transact any business for

or on account of the firm. Nor could he be employed for that purpose as agent, attorney or otherwise. He had no right to sell coal for the partnership as an agent; nor had a right to buy potatoes, or car wheels, or any other articles for the firm, if in doing so he acted as the agent of the concern. He had not the right to negotiate money as the agent of the partnership; nor could he assent to being held out to the public as the moneyed man of the concern without transcending his rights under the act of assembly. As a limited partner, he had no right to interfere in the management of the general business of the concern, either as a principal or as agent or attorney; when he invested his money he trusted it to the management of others. If he did no more than to examine the books and papers, and works, and to make inquiries, and inform himself as to the management of the concern, he only exercised his rights. If he did do more, and interfered with the management of the business generally, or if he acted as the agent or attorney for the partnership, he exceeded his rights, and the law makes him a general partner. This is a question of fact which, under the evidence, must go to the jury. His acts and declarations are evidence against him, but the declarations of McClintock are not evidence against John L. McKnight unless he was present and assented to them or adopted them. Copartners are liable for a tort committed in the prosecution of their legitimate business, or if done by their orders, or with their present assent: 7 Casey, 319. If afterward approved, ratified and maintained, it is evidence of their assent.

"Finally, the jury are instructed:

"1. That if John L. McKnight was a mere special partner their verdict must be in his favor.

"2. That John W. McKnight was present; he assented by his silence to the building of the dam, and the diversion of the water; he kept it up and maintained it; he is liable, and their verdict must be against him.

["3. If the jury believe, from all the evidence, that John L. McKnight, by his acts, rendered himself a general partner in the firm of McClintock & McKnight, and that the act was done by the servants or agents of that firm, and assented to by one of the partners, then John L. McKnight is equally

liable with John W. McKnight, and their verdict should be against both.]

"4. If the plaintiffs are entitled to recover either against one or both of the defendants, the measure of their damage will be compensatory, the actual damage sustained, the loss occasioned by delay. If the mine was rendered entirely useless, then the profit that might have been made on the coal would be a fair basis for estimating damage. If the water could have been removed, the cost of doing it might be the proper measure. The actual damage to the plaintiffs, under all circumstances, should be the amount of your verdict."

To this charge counsel on both sides excepted.

Under these instructions there was a verdict and judgment in favor of the plaintiffs against the two surviving defendants; whereupon this writ was sued out by John L. McKnight, for whom the following errors were assigned:

1 to 12. The court erred in permitting the plaintiff's counsel to ask E. M. Budd the following question: "Did or did not McClintock say that John L. McKnight had said he would attend to the note?" and in negativing the 1st, 2d, 3d, 5th, 7th, 8th, 9th, 11th, 12th, 13th and 14th points submitted by defendant below.

13. The court erred in affirming the fourth of the points submitted by the plaintiff below.

14, 15, 16. The court erred in charging the jury as above inclosed in brackets, and

17. In charging the jury upon the measure of damages, and in saying that they might include "the loss occasioned by delay;" that "if the mine was rendered entirely useless, then the profit that might have been made on the coal would be a fair basis for estimating damage," and that "if the water could have been removed, the cost of doing it might be the proper measure."

G. H. McCABE and FURMAN SHEPPARD, for the plaintiff in error.

M. M. DIMMICK and REEDER & GREEN, for defendants in error.

The opinion of the court was delivered May 6, 1863, by Thompson, J.

It startles one to hear it unqualifiedly denied, that one co-partner is not answerable for the willful torts of others of the firm; that a firm is not to be held responsible for such torts committed by a servant or agent; that when committed by a servant, of his own mere motion, or solely by a member of the firm, that the firm is not to be answerable, and that partners can only be made to respond for trespasses in which each is an actor. The affirmative of these positions is the substance of the first three points of the defendant below, and they were negatived without a qualifying remark. It is quite possible that they were inapplicable to the circumstances of the case, at least deemed to be so by the learned judge; but while they were true as general propositions, it would have been much better to have refused to charge as requested by a qualification of inapplicability. Indeed, I doubt much if the general denial did not mislead the jury in this case.

Looking into the general charge we may discover, I think, what must have been intended as a qualification of the general negative of these propositions. Here the learned judge states the rule to be, "that the partners are liable for a trespass by themselves or their agents, employes or servants, in the legitimate conduct of the partnership business," or if the trespass "be done by the direction of their agent, acting within the scope of his powers," or "by workmen, under the same qualification, while in the employment of the firm."

The authorities seem very clearly to sustain these positions: Collyer on Part., §§ 457, 460; Story on Part., § 166, and authorities there cited; Hill on Torts, 434–461; *Weed* v. *Panama Railroad Co.*, 17 N. Y. 362. The reason of the rule seems obvious. Suppose a firm sets miners to work in a mine, and they take coal beyond the boundaries of their employers' drift and from an adjoining owner's, who shall be responsible, the owners or their employes? The latter, surely; for it was their act that put in motion the force which did the wrong. Or, if hands be set to work to cut timber, and they cut over their employer's line, where is the principle which exonerates the employer from responsi-

bility, whether the act was willfully done or not? If wantonly and mischievously done, I grant that a different rule would apply, because the act would, in no sense, be within the scope of the employment, and it is because the trespass is within the scope of the employment that the master or members of a firm are answerable. It is out of the maxim "*qui facit per alium facit per se*," that partners, one of whom commits a trespass or authorizes it to be committed, in pursuing the ordinary routine of the business of the firm, may all be involved in liability. Nor do I think a distinction can be drawn between such a case and the one in hand, where the trespass complained of was in the act of protecting the property of the principals from injury on a sudden emergency. It was as much the duty of the employes to endeavor to save it from injury as to work according to directions when no danger threatened; and being done for the benefit of the employers, and under a *bona fide* seeming necessity to act, the law will ascribe to the act their assent and direction. It would comport with no principle of justice that the servants and agents should be alone answerable in such a case and the parties benefited escape. See Lindl. on Part., p. 238 *et seq.* and notes.

Taking this to be all true, were the instructions adequate and proper in the circumstances of this case? Among other things, the learned judge charged that if John L. McKnight had rendered himself, by his acts, answerable as a general partner of the firm of McClintock & McKnight, and the trespass in question was by the acts of the servants or agents of the firm and assented to by one of the partners, then he was equally liable with the member assenting. This is the substance of the remarks of the judge on this point.

The evidence, to affect John L. McKnight, was not that he acted in the business of the firm like a general partner, in managing, directing or controlling its affairs. This was not pretended or attempted to be proved. The object of the testimony against him was, if possible, to show some act, which, being prohibited by the act regulating general partnerships, should render him liable for the debts and engagements of the firm. One act, if within the prohibition of the statute, would be as effectual to involve him in liability as many. But it must be borne in mind that it is not as a partner

he is sued, but for a trespass attempted to be established through his relation as a special partner. Now, between general partners, where liability ensues to all, it is because the act of one is the act of all, within the legitimate routine of the firm business. The association for conducting the business of a partnership is a unit; it has no parts, and hence all may be answerable; and hence the presumption that all acted or all assented whenever the act or assent of one binds the whole. But the very opposite of this, the proof showed, was the condition of John L. McKnight. He was the special partner. There were general partners who did the general business. He was excluded from that by law. It was not shown that he assumed to act as such, but only did some act which, it was claimed, should render him liable as a general partner. Suppose this to have been proved; does an act having no relation to the trespass establish the trespass against him, or raise a presumption that because he might be ultimately liable for the firm debts that he had assented to the act of trespass complained of? He was not one of those who managed its business, or employed its workmen and directed their operations. His position more resembled that of a creditor than a partner, and to make him answerable by imputation or construction was simply on account of his money in the firm, and not because he either actually or constructively, by reason of association, did any thing, or assented to any thing. It is clear that his liability could not be sustained on the principle upon which, in this part of the charge, it was put. The syllogistic position in regard to him in the resume of the charge by the learned judge is stated thus: "John W. McKnight was present; he assented by his silence to the building of the dam, and diversion of the water; he kept it up and maintained it. He is liable, and the verdict must be against him." Second proposition: "If John L. McKnight rendered himself a general partner (no matter how) in the firm of McClintock & McKnight, and the acts (the alleged trespass) were done by the servants or agents of that firm and assented to by one of the partners, then John L. McKnight is equally liable with John W. McKnight and the verdict should be against both." Thus clearly determining that by whatever means or acts, however disconnected with

the question of wrongdoing in the matter complained of, still, if he was unfortunate in one particular, he must be punished for others to which he was a stranger. This resembles the imputed sins which in olden times the scapegoat was accustomed to bear away. The instructions of the court in regard to John L. McKnight, under the evidence, were erroneous in the particulars noticed. These remarks sufficiently answer the 2d, 3d, 4th, 5th, 7th and 15th assignments of error.

The eighth and ninth assignments may be considered together, and require but little discussion. We are of opinion that the points of which they are predicated, should have been affirmed, instead of receiving a negative answer. We have carefully examined all the testimony bearing on these points, and neither separately nor collectively does it disclose any ground to charge John L. McKnight as a general partner. There is no law which prevented him from selling potatoes or truck-wheels to the firm, or buying coal from them; nor could the declarations of his copartners, that he was the moneyed man of their firm, involve him. The articles of association and recorded certificate said the same thing. Nor can I discover the testimony wherein he undertook to control, manage or play agent for the firm. There is no law against his doing an occasional act or errand for the firm; this is not the kind of agency the act prohibts. The statute is quite strict enough to leave its provisions of any practical value; but were we to hold to the strictness insisted on here, we should do so without authority of law, and if the law did require us so to hold, no man in his senses would ever become a special partner. There was therefore error in this portion of the charge.

10. We are not convinced of error in this specification. If the defendants permitted the plaintiffs to operate through their gangway, although this might not have been the most prudent or safest mode of mining, yet it would not justify the defendants in willfully filling the shaft with water. It is not a question of negligence which we have here, where counter negligence might be a defense, but a case in which the injury is alleged to have been willful. We see no error in the answer of the court to the 11th and 12th points of the defend-

11. We agree with the learned judge, that if it was only loose conversations which the parties had in relation to whether the water would drain out of shaft No. 9, before it would reach defendants' drift, the jury should pay no attention to it. But the point called for an answer to the proposition put by the defendants below, and that was to the effect that if the plaintiffs notified and informed the defendants that the water would escape before it would damage them, then any damage done resulted from their own misrepresentations, for which they would not be entitled to recover. We think this proposition should have been affirmed, referring the special circumstances of the case to the jury. That shaft had been sunk by the defendants. If nobody was to be injured by filling it with water, the defendants certainly might do so with entire impunity. If the proof should, on another trial, establish the facts alleged in the point, we think the plaintiffs would not be entitled to recover, and so the jury should be instructed.

12. This assignment relates to a supposed necessity for leaving barriers in coal mines. We think this matter need not be discussed, for reasons elsewhere assigned; that this is not a case where mutual negligence, if established, would be a defense; the gravamen of this action is the willful acts of the defendants.

The 13th, 14th, 15th and 16th assignments need but little comment. The court committed no error which we can discover in affirming the plaintiffs' fourth point, as the case stood on the evidence. What modifications may be required in answer to such a point on a retrial, on account of the different views we have expressed on other parts of the case from what was entertained by the court below, we will not stop to inquire. That will, no doubt, be seen to by the court, if modification to harmonize be necessary. Nor is anything to be corrected which is embraced in the 14th specification. The 15th and 16th assignments have been in substance disposed of in our remarks on the 7th, 8th and 11th assignments.

17, and lastly. The court very rightly charged on the subject of the damages, that they "must be compensatory; the actual damage sustained; the loss occasioned by the delay." So far the instruction was right. It is true, in wan-

ton and aggravated trespasses, more than mere compensation may be allowed by way of punishment, but it was not claimed that that was the character of the acts complained of here. But a difficulty arises on account of the next remark of the learned judge. He adds: "If the mine was rendered entirely useless, then the profit that might have been made out of the coal, would be a fair basis for estimating damage." In this it seems to me there was error. I very frankly confess that it is often much easier to discover where an assumed rule for damages will lead to erroneous results, than to point out in all cases in advance, what the true rule should be. But merely speculative profits, supposed to have been lost, has been, I think, universally discarded by this court. The difference in value between the original price of the thing injured and what it has been enhanced by circumstances, although this, in one sense, is profits, is undo btedly allowable, and easily to be ascertained. This is but making the injured party whole. It is the direct fruits which the property injured would have borne him, and is the rule recognized in this court in *Hoy* v. *Gronoble*, 10 Casey, 9. But, "profits which *might* be made" from a mine, opens an indefinite and vague region, in which each mind or imagination might indulge in visions as glittering as the caves of Aladdin, or be depressed with the idea of entire worthlessness. There would be no limit to speculation, and to illustrate this is the object of the extreme figure we have used. "The profits that might be made." These would depend on a thousand contingencies. The success in working the mine against the ever-resisting laws of nature to efforts to disembowel the earth; these, to be successful, would depend on the management of its affairs—the diligence, prudence, wisdom and skill in directing the operations. After this would come the contingencies of a market, of transportation, of the demand for the particular product, the abundance or scarcity of money, the crops, and the state of the country. Dependent on such a list of contingencies, nothing like a rule could be extracted from such a standard. What the actual damage to the plaintiffs would be in delay, loss of time, injury to machinery and the like, if the mine is reclaimable, would certainly be just. In short, whatever was the actual injury resulting directly to the plaintiffs,

should be compensated. If entirely lost, then the full value of the estate and property would be the measure. There is always some standard for this, as we constantly see the sales and purchases of such interests. Whatever ascertains this, is proper evidence upon which a jury may base their estimate: Sedgwick on Damages, 69; *Schr. Lively*, 1 Gal. 314; *Forsyth* v. *Palmer*, 2 Harris, 96; *O'Conner* v. *Forster*, 10 Watts, 418; and *Hoy* v. *Gronoble*, 10 Casey, *supra*. We think, therefore, for the reasons given, that the learned judge opened too wide a range for damages in that part of his charge. For this, as well as the other reasons assigned, this judgment must be reversed.

Judgment reversed and venire de novo awarded.

SKILLMAN v. LACHMAN ET AL.

(23 California, 199. Supreme Court, 1863.)

Jurisdiction on appeal—How determined. Where a plaintiff appeals against a judgment for the defendant, the jurisdiction of the Supreme Court, as to amount, is determined by the complaint. Where the plaintiff appeals from a judgment in his favor, then it is the difference between the judgment and the sum claimed. Where the defendant appeals from a judgment in his favor, the amount in dispute is the difference between the judgment and the counter-claim.

Interest goes to make up the amount in dispute, and if the interest added to the principal swells the judgment to the sum at which the court takes jurisdiction, it is the same as if the principal had equaled that amount.

[1] **Where the several owners of a mine co-operate to work it,** they form a mining partnership.

[2] **A mining partnership differs** from an ordinary partnership, in certain incidents, to wit: *inter alia* (1) the sale of his interest by one partner does not dissolve the relation; (2) no one partner can bind the company by note or contract of indebtedness in the name of the company.

Where the note of the mining firm is sued on, the plaintiff must prove that the person executing the same had authority to subscribe the company's name.

The power to purchase materials for the use of the mine does not imply the power to execute a note bearing interest.

Title to stolen stock can not be divested out of the real owner by sale at auction and purchase by innocent buyer.

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[1] *Dougherty* v. *Crary*, 1 M. R. 35; *Higgins* v. *Armstrong*, 10 Pac. 232; *Nolan* v. *Lovelock*, 9 M. R. 360.

[2] *Duryea* v. *Burt*, 11 M. R. 395.

Appeal from the County Court, Nevada County.

C. WILSON HILL, for appellant.

THOMAS P. HAWLEY, for respondent.

CROCKER, J. delivered the opinion of the court, NORTON, J. concurring, and COPE, C. J. concurring specially.

This is an action upon a promissory note for one hundred and two dollars, with interest at three per cent. per month, against the defendants, as members of the "Gold Hill Company," originally brought before a justice of the peace, where a judgment was rendered against the defendants, from which they appealed to the county court, where judgment was again rendered against them for two hundred and sixty dollars and forty-six cents, besides costs, that sum being the principal and interest of the note, and from which they appeal to this court.

The respondent contends that as the note was for the sum of one hundred and two dollars only, this court has no jurisdiction of the case. Where the plaintiff is appellant, and the judgment is for the defendant, the jurisdiction of this court is determined by the amount claimed by the complaint, for that is the "amount in dispute" in such cases: *Gillespie* v. *Benson*, 18 Cal. 410; *Votan* v. *Reese*, 20 Id. 89. But if the appeal is by the plaintiff from a judgment in his favor, then the "amount in dispute" is the difference between the amount of the judgment and the sum claimed by the complaint: *Votan* v. *Reese*, 20 Cal. 89. So, upon the same principle, if the appeal is taken by the defendant from a judgment rendered against him for a sum exceeding two hundred dollars, exclusive of costs and percentage, this court has jurisdiction of the case because the amount of the judgment is the "amount in dispute" on the appeal. So, too, if the appeal is taken by the defendant from a judgment in his favor, where he has set up a counter claim, if that judgment is for a sum more than two hundred dollars less than he claims in his answer, this court has jurisdiction. The respondent contends, however, that the interest due on the demand forms no part of the amount to be

included in the estimate of the "amount in dispute." In this he is mistaken. The interest forms part of the demand sued for, and should properly be included in the estimate. It follows that the objection to the jurisdiction of this court is not well taken.

The transcript in this case is very imperfect; neither the notes sued on nor the pleadings are inserted in it. It appears, however, that the plaintiff furnished the "Gold Hill Company" (a company of persons who were working a mine together) with a quantity of lumber, for which the note was given, and which was signed, as follows: "H. P. Sprout, Foreman for Gold Hill Company." When the note was offered in evidence in the county court, the defendants objected that it was the note of Sprout, and not of the company, which was overruled and excepted to. Judging from the signature it would appear to be the note of Sprout alone, and the words "Foreman for Gold Hill Company" are merely *descriptio personæ;* but the terms of the note itself may show that it was, in fact, intended to be the note of the company. This point we can not determine, as the note does not appear in the transcript.

The principal point raised by the appellant is that the owners of the claim are tenants in common and not partners; that Sprout was one of the owners, and that one co-tenant can not bind his co-tenants by a note given in the name of the company. This question of the relation which exists between persons owning several interests in a mine, and engaged in working the same, is a very important one. Whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that where the several owners unite and co-operate in working the mine, then a new relation exists between them, and, to a certain extent, they are governed by the rules relating to partnerships. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has also some rules peculiar to itself—one of which is that one person may convey his interest in the mine and business, without dissolving the partnership: *Fereday* v. *Wightwick*, 1 Russ. & Mylne, 49. Still, there may be a partnership in the working of a mine, subject to the rules relating to an ordinary partnership in trade: Story on Part., Sec. 82. And this rela-

tion of partnership may be constituted either by express stipulation or by implication deduced from the acts of the parties: Rockw. on Mines, 575. But in the case of an ordinary mining partnership, something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership. Such persons, in the absence of other circumstances, can not fairly be presumed to have intended to render themselves liable to all the consequences of a commercial partnership: Id. The same author concludes his examination of this question as follows: "If the works are carried on by persons as mere owners of land, concurring in a general system of management for their common benefit, the shares of each person will only be liable for his individual engagement, and to the payment of debts contracted by himself, or his authorized agent, without interfering with the shares of the other tenants in common." Id. 579.

There have been several decisions relative to the rights and liabilities of shareholders in mining companies to the public and among themselves, which it may be well to examine. In the case of *Vice* v. *Lady Anson*, 7 B. & C. 409, which was an action for goods sold and materials furnished for working a mine, in which the defendant held one share, evidenced only by a certificate issued by the secretary of the company, the plaintiff, at the time he furnished the goods, had no knowledge that she was a shareholder. She had paid the deposit on some shares, and had spoken and written of herself (in private letters) as a shareholder of the company. The judge held that the plaintiff did not actually give credit to the defendant, and was not misled by her, and that she never held herself out to the world as a partner, and therefore she could only be chargeable on the ground of being really interested. The fact that she thought she had an interest did not make her interested; and he held that the certificate conveyed no interest in the mine, and therefore she was not liable. The correctness of this decision, that it was necessary to prove a conveyance of an interest in the mine, has been doubted.

The case of *Dickinson* v. *Valpy*, 10 B. & C. 128, was an action by an indorsee of a bill of exchange, drawn and accepted

by a mining company, against the defendant as a member of the company. The defendant had applied for and obtained shares in the company, on which he had paid several installments. The business of the company was transacted by a board of directors, and the bill had been drawn and accepted in pursuance of a resolution passed by them. It was held necessary for the plaintiff to show that the directors had power to bind the shareholders by drawing bills of exchange; and for that purpose, evidence should have been given of the nature and character of the business of the company, to show that in order to carry into effect the purposes for which it was instituted the drawing and accepting of bills was necessary, or to show from the practice of similar companies that it was *usual* to draw such bills. It was also held, that although in ordinary trading partnerships the law implied that one partner had power to bind another by drawing and accepting bills, yet that rule did not apply to mining partnerships, without showing that it was necessary to carry on its business.

In *Tredwen* v. *Bourne*, 6 M. & W. 461, it was held that the members of a mining company have authority by law (in the absence of any proof of a more limited authority), to bind each other by dealings on credit for the purpose of working the mines, if that appears to be necessary or usual in the management of the mines. In *Hawtayne* v. *Bourne*, 7 M. & W. 595, the managing agent of the mining company had borrowed money from a bank to pay debts due to laborers who had levied distress warrants upon the materials of the mine, and it was held that there was no rule of law that such an agent could, even in case of an emergency suddenly arising, raise money and pledge the credit of his principals for its repayment; that the authority of the agent was only that he should conduct and carry on the affairs of the mine in the usual manner; and there was no proof of express authority to borrow money, or that it was necessary in the ordinary course of the undertaking.

A joint stock company was formed to work a mine, in which the defendant became a shareholder, and took part in its proceedings. The prospectus, issued on the formation of the company, stated that all supplies for the mine were to be purchased at cash prices, and no debt was to be incurred; and

the scrip certificates also bore an indorsement to the same effect. The plaintiff supplied goods for the necessary working of the mine, on the order of a resident agent appointed by the directors to manage the mine, which was the customary course in such concerns: *held*, that the defendant was liable to the plaintiff for the price of such goods, notwithstanding the statements in the prospectus and certificates, unless it were shown that the agent had, in fact, no authority from the defendant, and that the plaintiff had notice thereof: *Hawken* v. *Bourne*, 8 M. & W. 703.

Where a defendant is charged with a debt in an action for work and labor as a partner in a mining company, but is not shown to have either contracted such debt personally or represented himself to the plaintiff as a partner, the fact of his having been partner may nevertheless be shown by evidence short of strict proof that he had executed a deed of copartnership, or was legally interested in the mine. The fact may be proved by his admission made before or after the debt was incurred: *Ralph* v. *Harvey*, 1 Q. B. 845. One of several coadventurers in a mine has not, as such, any authority to pledge the credit of the general body for money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of circumstances from which an implied authority for that purpose can be inferred: *Ricketts* v. *Bennett*, 4 C. B. 686.

Such is the uncertainty of mining operations that few are willing to risk all their means in such undertakings; and it is therefore customary for a number of persons to unite in the enterprise; and often the interests owned by each differ greatly in amount, according as each is able to furnish means, or is willing to take the risk. As a general rule, it is impracticable for each proprietor to work his interest in the mine separate from the others; hence arises the necessity for an organization of some kind to work the mine, such as a corporation, joint stock company, or mining partnership. The company in the present case is one of the latter class. As each owner has a right to sell and convey his interest at any time, and as in ordinary partnership, such sale would dissolve the partnership, and compel a winding up and settlement of the business, which would be most disastrous to a mining enterprise, it has

become an established principle that such sale does not dissolve a mining partnership, but it continues on as before. Such a radical change in the law of partnership necessitates other changes. One result is, that new members are thus introduced into the company without the consent, and often against the wishes of the other members; and it would be most unjust to subject each proprietor to personal liabilities which might sweep away all his property, created against his consent, by those who became members against his wishes. Hence arises the necessity of establishing new rules for such partnerships, differing from those regulating ordinary partnerships, especially those relating to the power of any one member, or a majority of the members, or of the superintendent or managing agent, to make contracts binding upon the company or its members, and also regulating the extent and nature of the liability of each proprietor for the company debts, as between themselves and third persons. The rules regulating ordinary partnerships will, to some extent, form a proper guide, but do not necessarily determine these questions. It is impossible to lay down a perfect code of rules upon this subject; but, like other legal rules, they must be settled as they arise in cases requiring their determination. Such rules must be governed by the peculiar condition and circumstances of the country, and must be founded upon sound principles of justice, and such as will protect the rights of individual proprietors against the unauthorized acts of others and at the same time properly secure the claims of creditors and insure the successful working of the mine.

In the present case it appears that the defendant Lachman, for a long time prior and up to June 25, 1858, held a mortgage on the interest in the mine of one Prior; that on that day he took a conveyance of that interest in satisfaction of the mortgage, and conveyed the same interest to one of the defendants, Sprout, on the twenty-eighth day of June, and received a mortgage on Sprout's interest in the mine to secure the payment of the purchase money. This appears to be, in fact, all the interest he had; but it was proved that both prior to and after the date of the note, which was dated June 20th, he admitted to two persons, one of whom was a brother of the plaintiff, and who delivered most of the lumber, that he

owned an interest in the mine. It does not appear that any of these statements of Lachman were the means of inducing the plaintiff to sell or deliver the lumber. These statements of the defendant Lachman do not operate as an estoppel upon him, unless it appears that the plaintiff was induced thereby to sell and deliver the lumber to the company. Neither the evidence nor the findings of the court contain any facts or evidence establishing this point.

But there is still a more important objection to the findings and judgment in this case. There was no evidence of any authority having been given by the company or Lachman, to Sprout, a member of the company and the managing agent or foreman, to execute a promissory note in the name of and binding the company for the indebtedness due the plaintiff, or any general authority to that effect. In fact, several members, including Lachman, testified that they never gave him any such authority. It is clear that the law does not, in the case of mining partnerships, imply any such authority either to a member of such partnership, or to its managing agent. In this respect, the rule of law is different from that of ordinary commercial partnerships. It was clearly the duty of the plaintiff to prove that the person executing the note in the name of the company had power and authority to do so. He might have had power to purchase the lumber for the use of the mine, but that is very different from authorizing him to execute a note in the name of the company, bearing interest at the rate of three per cent. per month. In this case the county court failed to draw the proper distinction between the liability of members of a mining partnership and ordinary trading partnerships, and in this it erred.

The judgment is therefore reversed and the cause remanded.

COPE, C. J.—I think the conclusion arrived at by Justice CROCKER is correct, and I therefore concur in the judgment.

BRADLEY ET AL. v. HARKNESS.

(26 California, 69. Supreme Court, 1864.)

[1] **A ditch is real estate,** and each interest may be sold or incumbered without regard to the consent of the co-proprietors.

Ditch owners are tenants in common. In the absence of any special facts, the co-owners of a ditch are to be considered tenants in common, and from the mere fact of co-ownership, no partnership can be presumed.

[2] **Distinction between partnership and tenancy in common.** A partnership is the creature of contract; a tenancy in common results as an operation of law. With partnership, a new incoming party dissolves the firm relation. Tenants in common may buy in or sell out at pleasure.

Idem—Desire to part. The mere desire of one of the co-tenants is sufficient to authorize the courts to grant a dissolution; that is not enough between partners.

Partnership not created by purchase. The averment of a purchase of an undivided interest in a ditch does not imply a partnership.

Defective complaint—Amendment. Upon complaint seeking an accounting between ditch owners, proceeding partly upon the theory of a partnership between the parties, and partly upon the theory of a co-tenancy, but failing to state facts sufficient to constitute either a partnership or sufficient to make a case for partition: *Held*, that the plaintiffs were not entitled to any of the relief demanded in the prayer, but would be allowed to amend on payment of costs.

[3] **Partition of ditch—Mortgage—Account.** A mortgage upon an undivided interest in a ditch may be adjusted in a suit for partition of the ditch, and an account of the water rents taken.

Appeal from the District Court, Fourteenth Judicial District, Placer County.

The following is the complaint in this action:

"*E. L. Bradley and M. S. Gardner* v. *Osmyn Harkness and James Armstrong.*

"The above named plaintiffs, by their attorneys, complain of the above named defendants, and for cause of action aver, that on the 12th day of April, A. D. 1858, they, together with one Robert M. Trim, since deceased, under the name and style of the Dutch Flat Water Company, became the copartners of

[1] *Reynolds* v. *Hosmer*, 4 M. R. 658.

[2] *Brady* v. *Calhoun*, 1 Pen. & W. 140; *Pickerell* v. *Fisk*, 11 La. Ann. 277; *Tuck* v. *Downing*, 7 M. R. 84.

[3] *Dall* v. *Confidence Co.*, 11 M. R. 214.

the defendant Harkness, in a certain water ditch situate in Township Number Four, county and State aforesaid, the same being constructed to convey water for mining purposes, commencing at a point on Cañon Creek, and conveying water therefrom to Gold Run, Indiana Hill, Gophertown and Buckhorn Hill, being from five to six miles in length, and generally known by the name of the Indiana Ditch.

"That at the date aforesaid, they and the said Trim, since deceased, became and were the owners of seven nineteenths of the said Indiana Ditch, and, in proportion as seven is to eleven, were copartners of the said Harkness therein. That on the 13th day of June, 1859, they, together with said Trim, since deceased, acquired one additional nineteenth interest in said ditch; since which last mentioned date they and the said Trim, until his death, as hereinafter stated, under the name and style of the Dutch Flat Water Company, were copartners of the said Harkness in said ditch in the following proportions: The Dutch Flat Water Company had and owned eight nineteenths, and the said Harkness had and owned eleven nineteenths thereof. And plaintiffs further show, that the eight nineteenths of said ditch so held by the Dutch Flat Water Company, as aforesaid, was the partnership property of said firm; and that on or about the 16th day of June, A. D. 1861, the said Robert M. Trim departed this life intestate, in the county aforesaid, since which time plaintiffs have been and are still the surviving partners of said firm, and have transacted their business under the same common name.

"And plaintiffs further show, that from the date of ownership and copartnership with the said defendant, as hereinbefore stated, until the death of the said Trim, they and the said Trim, under the name and style aforesaid, were the owners of the said eight nineteenths, and copartners with the said Harkness in proportion to their said ownership; and that since the death of the said Trim they have continued as surviving partners to own the said eight nineteenths of said ditch, and in that proportion copartners with the said Harkness.

"And plaintiffs aver that said Harkness, on the 12th day of April, A. D. 1858, became a copartner with the said Dutch Flat Water Company in the ownership affairs and business of the Indiana Ditch aforesaid; that his interest was then and ever since has been eleven nineteenths thereof, and his co-

partnership interest therein proportionate to his ownership as aforesaid.

"And plaintiffs further show that the said Harkness has, during the whole period of the copartnership aforesaid, managed and controlled its business and affairs, has had the same under his sole supervision, and has collected and received all the rents and profits arising from the sales of water from said ditch, which sales have amounted, exclusive of expenses, to the net aggregate of about the sum of nine thousand five hundred and fifty dollars, all of which he has retained and converted to his own use, except the sum of two hundred and sixty dollars paid over to plaintiffs during the year A. D. 1858. And the said plaintiffs, upon their information and belief, aver that the said Harkness is indebted to them in about the sum of four thousand dollars for money had and received by him, as their proportion of the proceeds from said ditch, and they aver that they have oftentimes, prior to the commencement of this suit, demanded of the said defendant to pay over to them their proportion of the said proceeds, and to render an account of the business and affairs of said copartnership, and that the said defendant has hitherto, and still does, obstinately and without any just ground, refuse to settle with plaintiffs or to render an account, or to pay over plaintiffs' portion of the said proceeds, or any part thereof, except the said sum of two hundred and sixty dollars before mentioned; and plaintiffs represent that their copartnership interest in said ditch, so long as it shall remain in the possession and under the control and management of the said Harkness, will be utterly worthless to them and yield no income, and they say and aver that said ditch property can not be divided or partitioned without serious damage to the whole property.

"And plaintiffs further show that defendant Harkness, on the 7th day of July, A. D. 1860, executed, acknowledged [and] delivered to the defendant Armstrong, a mortgage on his undivided interest in said copartnership property, to wit, the ditch aforesaid, purporting to be given to secure a debt for two thousand one hundred dollars, bearing interest at the rate of two per cent. per month from date until paid, which mortgage was recorded in the recorder's office of Placer county, on the 10th July, A. D. 1860, and remains unsatisfied upon the record. And plaintiffs say that said mortgage was given to secure the

individual indebtedness of the said Harkness to said Armstrong, and that the same and the demand therein mentioned are subject and subordinate to the rights of the plaintiffs as copartners of the said Harkness.

"Plaintiffs claim that the amount which may be found due them on a settlement of the said copartnership takes precedence and has priority over the said mortgage.

"Wherefore, the premises considered, plaintiffs pray the decree of the honorable court for a dissolution of the copartnership existing between them and the defendant Harkness. They ask that an account be taken between them and the said Harkness touching the affairs, rents, and property of said ditch, and for judgment against said Harkness for the sum which may be found due upon the taking of said account; that the sum so found due be decreed to have priority over the mortgage lien of said Armstrong; that said ditch be sold to the highest bidder for cash, after giving due notice of the time and place of sale, and the proceeds arising from such sale be applied as follows, to wit:

"*First*—To the costs of this action, and the expenses of making said sale.

"*Second*—That eight nineteenths of said proceeds, after deducting said costs and expenses, be paid over to plaintiffs.

"*Third*—To the payment of the Armstrong mortgage.

"*Fourth*—The surplus, if any, to be paid to defendant Harkness. And plaintiffs further ask that they may be purchasers at said sale, and that after the application of the proceeds as may be directed by the court, that the said Armstrong be decreed to satisfy his said mortgage.

"And plaintiffs pray for such other and further relief as equity sanctions, and for general relief.

"HALE & SMITH,
"*Attorneys for Plaintiffs.*"

The defendant demurred to the complaint. The demurrer was overruled, and defendant answered. On the trial plaintiffs recovered judgment and defendant appealed both from the judgment and from an order denying a new trial.

CHARLES A. TUTTLE, for appellant.

TWEED & CRAIG, for respondents.

SANDERSON, C. J., delivered the opinion of the court.

The demurrer to the complaint ought to have been sustained. It proceeds upon two legal theories which are wholly inconsistent. It first alleges a copartnership in general terms in the ditch, which is followed by allegations respecting the management thereof and its rents and profits. It then drops the copartnership theory and adopts that of a tenancy in common in real estate, and avers that the ditch can not be divided or partitioned without serious injury, and asks that an account of the rents and profits may be taken and the ditch sold, etc. The pleader seems to have been unable to determine which was the true theory, and in his doubt and uncertainty, concluded to partially incorporate both in his complaint, being satisfied that one or the other must suit the facts to be developed by the evidence. In addition, and apparently for the purpose of completing his salmagundi, the pleader throws in a note and mortgage of the defendant upon his interest in the ditch, and asks that it may be foreclosed and defendant's equity of redemption cut off by an absolute sale, as in partition, of the ditch. This style of pleading, if allowed, would lead to most pernicious results. All correspondence between matters of allegation and matters of proof would be dispensed with and the judgment or decree allowed to proceed upon a theory of its own and not *secundum allegata*, but regardless of the pleadings.

We can not, if so disposed, discard any part of the complaint as surplusage, for the complaint does not state facts sufficient to constitute a cause of action under either theory. In the absence of any special facts constituting them something else, the proprietors of ditches in the mining districts are tenants in common of real estate, and their rights in the ditch and in the profits arising from the sales of water, although in the latter respect analogous to those of copartners, are governed by the law of tenancy in common. The ditch is real estate, and each proprietor buys in, or sells out, or incumbers his interest at pleasure, regardless of the knowledge, or consent, or wishes of his co-proprietors, and without affecting the legal relation existing between them beyond the going out of one and the coming in of another. This can not be done where a copartnership exists. One can not buy in or sell out of a partnership

at pleasure. Such an act would of itself work a dissolution of the partnership and necessitate its final settlement and closing out. A tenancy in common results from a rule of law by which it is also controlled and governed. A partnership, on the contrary, is the result of agreement between parties, which also supplies the rules for its government. The former relation is undisturbed by a change of tenants, but the latter admits of no change as to its members; and where a change takes place by the consent and agreement of all the parties concerned, the old firm is thereby dissolved and a new one created. Thus the incidents annexed to each have a different origin and are diverse; also, the proceedings for a dissolution of these relations are different and are grounded upon entirely different facts. As to the first, the mere desire of one of the tenants is sufficient to set the courts in motion; but as to the latter, cause must be shown.

The complaint in this case does not aver a contract of copartnership between the plaintiffs and defendant; on the contrary, it is apparent from the facts, so far as they appear, that there was no partnership between them. The averment is that the plaintiffs, on the 12th of April, 1858 under the style of the Dutch Flat Water Company, became the copartners of the defendant Harkness in a certain water ditch, describing it. In the next paragraph it is shown how they became copartners by the averment that at the date aforesaid they became the owners of seven nineteenths of said ditch, and thus as seven is to eleven, became the copartners of the defendant. The two allegations must be read together. So the idea of a copartnership is grounded entirely upon the fact of a purchase by the plaintiffs of an interest in the ditch in which the defendant was and had been a part owner with plaintiffs' grantors, and not upon any contract of copartnership between them and the defendant. After what has been said, it is hardly necessary to add that a partnership with defendant was not the result of the plaintiffs' purchase. Upon the partnership theory, therefore, the complaint fails for the want of facts to uphold it. Upon the theory that the action is brought for a partition of real estate, the complaint is equally defective because the primary facts upon which a right to a partition is founded (section two hundred and sixty-four of the Practice Act) are nowhere averred.

So far as the real facts of the case can be surmised by the dim light afforded by the record, the plaintiffs' remedy is by suit for partition. In such an action the mortgage claim of the plaintiffs can be settled and adjusted, and, as collateral to the main question, an account of the water-rates can be taken and the rights of the parties therein respectively ascertained.

The judgment is reversed and the plaintiffs allowed to amend their complaint upon the payment of the costs on this appeal and the costs of the former trial in the court below.

DURYEA V. BURT ET AL.

(28 California, 569. Supreme Court, 1865.)

[1] **Mine owners working claim together.** If the owners of mining ground purchase adjoining ground and pay for it out of a common fund, and work the common property sharing the profits and loss of the enterprise in accordance with their respective interests, the elements of a partnership exist among the different owners, although there is no express stipulation between them to share the profits and losses.

[2] **Mining and ordinary partnerships distinguished.** Mining partnerships are distinguished from ordinary trading partnerships in not being founded on the *delectus personæ*, from which principle the rights and obligations of ordinary trading partnerships are derived.

Assignment no dissolution. One of the peculiar rules attaching to mining partnerships is that one person may convey his interest in the mine and business without dissolving the partnership.

Lien of partner against assets. It is a general principle, applicable to this case, that each member of a partnership has a specific lien on the partnership property, not only for the debts and liabilities due to third persons, but also for his own share of the capital stock and funds and for all moneys advanced by him for the use of the concern.

Real estate as partnership assets. Real estate acquired by mining partners for the purposes of the partnership concern, is subject to all the debts of the partnership and subject to the debts of one of the partners incurred in the administration of the property.

Purchase of interest subject to lien—Notice when presumed. If the interest of a mining partner in the common property is purchased while another party has a lien against such interest, the lien subsists after the conveyance, unless it is lost by reason of the purchase being in

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[1] Note 1, *ante*, p. 381.

[2] *Skillman* v. *Lachman*, 11 M. R. 381; *Fereday* v. *Wightwick*, 11 M. R. 247; *Charles* v. *Eshelman*, 2 M. R. 65.

good faith for a valuable consideration, without notice of the existence of such lien; and if the purchaser is apprised of facts sufficient to put him on inquiry and to lead him by a diligent investigation to discover the truth, he will be deemed to have notice of the truth.

Where the purchaser of an interest in a claim is aware of its being worked by mining partners, he is put on notice of a partner's lien.

Appeal from the District Court, Eleventh Judicial District, Nevada County.

The plaintiff appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion of the court.

D. BELDEN, for appellant.

HAWLEY & WILLIAMS, for respondents.

By the Court, CURREY, J.

This action was brought to dissolve a partnership alleged to have existed between the plaintiff and the defendant Burt, from the 1st of June, 1860, to the time of filing the complaint, which was on the 25th of February, 1864, and to obtain an accounting between them and a sale of the partnership property for the payment of the partnership debts. The defendant, Depuy and Burrell, on the 5th of February, 1864, purchased of Burt his interest in a portion of the property owned by him and the plaintiff, which the plaintiff maintains was purchased by them subject to a partnership lien for the payment of the partnership debts then due. The court before which the cause was tried found in substance the following facts:

First. That early in May, 1860, Burt and five other persons, of whom the plaintiff was not one, owned a part of the property described in the complaint.

Second. That afterward, and at different times, the plaintiff purchased the interest of all these owners, except Burt, until, in December, 1861, he had acquired the undivided five sixths of the property, at which time the other undivided sixth of the same belonged to Burt.

Third. During the period from the 1st of May, 1860, to the 1st of December, 1861, the owners of the property as a mining company acquired by several purchases other property, consisting of a ditch and mining grounds, which is a

part of the property described in the plaintiff's complaint. These purchases were paid for out of the common funds of the company. The parties owning the property worked the ground as a mining company, and used the water of their ditch in carrying on such work. The work was prosecuted by the parties interested, both before and after the plaintiff and Burt became the only parties having an interest in the property.

Fourth. The profits obtained and the losses sustained in working the mines were to be shared among the parties in proportion to their several and respective interests. Such, at least, it is found, was the tacit understanding among the members of the company, though it is found that there was no written agreement or express understanding among or between the members of the company on the subject, nor any agreement or contract that the interest of either of them in the mining claims was to be held for the company's debts, nor that there should be any lien on the undivided interests of the different owners of the land for the company's liabilities.

Fifth. That after the plaintiff and Burt became the only owners of the property, they became indebted to third parties in about two thousand dollars; that about one thousand two hundred dollars of it was to be paid for running a tunnel on a part of the company's mining ground, but the tunnel was not completed or accepted when Burt sold and conveyed to Depuy and Burrell.

Sixth. After the plaintiff and Burt became the only owners of the property, the latter used a large amount of the water from the ditch on some mining ground of his own; and it is found by the court that upon an accounting between them as to their company business, Burt was indebted to the plaintiff in the sum of one thousand five hundred and seventy-two dollars and fifty-five cents.

Seventh. That when Burt sold and conveyed to Depuy and Burrell, he informed Depuy that he was owing plaintiff seventeen or eighteen hundred dollars on their company account, and that plaintiff claimed a lien for it; but that it did not appear that Burrell had any such notice.

Eighth. That at the time of such sale and conveyance Burt was insolvent and so had continued.

Upon the facts so found, the court came to the conclusion that as against Depuy and Burrell the plaintiff's complaint should be dismissed, and that as against Burt he should have a personal judgment for one thousand five hundred and seventy-two dollars and fifty-five cents, and judgment was accordingly so entered. The plaintiff applied to the court to set aside the judgment entered against him, and for a new trial, which application was denied.

The defendants Depuy and Burrell controverted by answer the existence of any copartnership between the plaintiff and Burt; and as the rights of the parties depend in part upon the solution of this question, it will be first considered.

It does not appear distinctly from the findings of the court when the mining business was commenced by the several owners of the mining grounds involved in this controversy. They are called, in the finding of the court, and by the counsel for the respective parties, in their arguments, a company, who worked these mining grounds in the usual manner of working mining claims in California. The company made purchases of mining ground lying adjacent to that already owned by it, for which payment was made out of the common fund of the company. This company originally consisted of six persons, of whom Burt was one, but the plaintiff was not then a member of it. In May, 1860, the plaintiff first became a party in interest in the mining grounds which the company then owned, and he continued from that time until December, 1861, to purchase interests therein, by which means all the original members of the company, except Burt, became divested of their interest in the property, and the plaintiff became the owner of the undivided five sixths of it. After the plaintiff and Burt became the only parties in interest, and constituted the company or firm, it is fairly to be inferred from the pleadings and finding that they continued to work the mines as usual, and used the ditch as a means for the purpose. They shared the profits and losses of the enterprise in accordance with their respective interests in the property; that is, the plaintiff received five sixths of the profits, and Burt one sixth of the same, and the burdens and losses were borne by them in the same proportions. Though the court does not find that a partnership was created by express agree-

ment, yet it is found that by a tacit understanding between the parties they were to share the profits and losses of the enterprise according to their several interests.

To constitute a partnership between parties engaged in a business there must be a communion of profit between them. A communion of profit implies a communion of loss: Coll. on Part., Sec. 18; *Grace* v. *Smith*, 2 W. Black. 998; *Dob* v. *Halsey*, 16 Johns. 40; Story on Part., Secs. 18, 19; 3 Kent, 24, 25. It is not necessary that there should be an express stipulation between the partners to share the profits and losses, as that is an incident to the prosecution of their joint business: *Barrett* v. *Swann*, 17 Me. 180. So far, then, the elements of a partnership among the different owners of the property of this mining company is found to have existed.

Mining partnerships are said to possess some features peculiar to themselves which distinguish them from ordinary trading concerns. Collyer, in his treatise on the law relating to mines, at page 88 says: "A question of some nicety sometimes arises whether persons working mines are trading partners, or mere joint occupiers of land, using the minerals as a part of its produce;" and he then states as a result of the cases "that this question will turn on the consideration whether the land be obtained wholly or principally for the purpose of trading in the ore, or whether the selling of the ore be only incidental or appurtenant to the occupation of the land," and he observes that "when companies of adventurers have been formed for the purpose of mining, and obtained leases either of the land or the minerals, or license to work in pursuance of that object, the courts of equity have long since recognized such associations as a species of trading partnerships." In *Skillman* v. *Lachman*, 23 Cal. 203, it is said: "Whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that when the several owners unite and co-operate in working the mine, then a new relation exists between them, and to a certain extent they are governed by the rules relating to partnerships. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has some rules peculiar to itself—one of which is that one person may convey his inter-

est in the mine and business without dissolving the partnership." Mines are often and perhaps generally owned and worked by associations more numerous than ordinary trading partnerships. Accordingly, in the language of Collyer, mining partnerships were early recognized as differing from ordinary trading partnerships, in not being founded on the *delectus personæ*, from which principle the rights and obligations of ordinary trading partners are ordinarily derived; and he observes that "the dissolution of partnerships so numerous, by the death, bankruptcy, outlawry or felony of any one partner, would have been incompatible with that continuous working of a mine which is necessary to success. It would have been highly inconvenient if no partner had been allowed to part with his share without the consent of each of his copartners;" and hence it was decided, after many doubts, that a mining partner had the right to assign and transfer his share without the consent of his copartners; and that neither such assignment nor the death or bankruptcy of the owner of an interest in the mining concern operated to dissolve the partnership: *Fereday* v. *Wightwick*, 1 Russ. & M. 49. Another peculiarity of a mining partnership, noticed by the court in *Skillman* v. *Lachman*, 23 Cal. 198, is that one mining partner has not the power to bind his associates by engagements with third persons to the extent that an individual partner of an ordinary trading concern is competent to bind the firm of which he is a member. The reason for the distinction is because a mining partnership, which is subject to changes in its membership, as already indicated, is not founded on the *delectus personæ*, while an ordinary commercial partnership is—a difference which limits the powers of partners, for reasons which are obvious, to the performance of such acts in the name of the partnership as may be necessary to the carrying on of its business, or which are usual in like concerns: *Ricketts* v. *Bennett*, 4 C. B. 686; *Dickinson* v. *Valpy*, 10 B. & C. 128.

The plaintiff maintains that from the facts found a partnership lien existed in favor of the partnership for the debts of the firm, and also for advances made by the plaintiff beyond his share for the benefit of Burt; and that a lien for such debts and advances existed at the time of the sale and conveyance by Burt to Depuy and Burrell upon the interest so con-

veyed, and remained subsisting thereon when this action was commenced, and that the court erred in deciding otherwise.

It may be laid down as a general principle that each member of a partnership has a specific lien on the partnership property, not only for the debts and liabilities due to third persons, but also for his own share of the capital stock and funds, and for all moneys advanced by him for the use of the concern. In the words of Lord Hardwicke, "When an account is to be taken, each is entitled to be allowed against the other everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what the other has not brought in, or has taken out more than he ought; and nothing is to be considered his share but the proportion of the residue on the balance of the account." Coll. on Part., Sec. 125; Story on Part., Sec. 97; *Buchan* v. *Sumner*, 2 Barb. Ch. 167. The subjection of personal property of a partnership constituting its capital stock to the principle stated, is generally of no difficulty; but where the property employed in the partnership enterprise is real estate, held by the several partners as tenants in common, the question has been regarded as one of more embarrassment; mainly, we apprehend, because of the nature of the property itself and the law controlling its descent, and the inability of any one of the tenants in common to charge or dispose of any greater or other interest in such real property than that which he may have and hold.

Without entering at much length upon an examination of the English and American authorities on the subject, we may say that the doctrine is well established in America, that real estate purchased by partners, with partnership funds, for partnership purposes, is at law held by them as tenants in common; but in equity it is deemed as held in trust as a part of the partnership property, applicable, in the first place, exclusively to pay the partnership debts: *Burnside* v. *Merrick*, 4 Met. 541; *Hoxie* v. *Carr*, 1 Sum. 173; Story on Part., Secs. 91, 92; *Jones* v. *Parsons*, 25 Cal. 104, 105; *Pierce* v. *Trigg*, 10 Leigh, 406; *Sigourney* v. *Munn*, 7 Conn. 11; *Buckley* v. *Buckley*, 11 Barb. 74, 76; *Buchan* v. *Sumner*, 2 Barb. Ch. 197, 206; *Divine* v. *Mitchum*, 4 B. Mon. 488; *Dyer* v. *Clark*, 5 Met. 562. In the case last cited, at page 577, Mr. Chief

Justice Shaw said: "It appears to us, that considering the nature of the partnership and the mutual confidence in each other which that relation implies, it is not putting a forced construction upon their act and intent to hold that when property is purchased in the name of the partners, out of partnership funds and for partnership use, though by force of common law they take the legal estate as tenants in common, yet that each is under a conscientious obligation to hold that legal estate until the purposes for which it was so purchased are accomplished, and to appropriate it to those purposes by first applying it to the payment of the partnership debts, for which both his partner and he himself are liable; and until he has come to a just account with his partner. Each has an equitable interest in that portion of the legal estate held by the other, until the debts, obligatory on both, are paid, and his own share of the outlay for partnership stock is restored to him." And in *Howard* v. *Priest*, the same learned judge decided that real estate thus acquired is held in trust, "each holding his property in trust for the partnership, until the partnership account is settled, and the partnership debts paid." Id. 585.

In *Buchan* v. *Sumner*, Chancellor Walworth, in an elaborate opinion, in which he reviewed the English and American cases on the subject, considered the American decisions in relation to real estate purchased with partnership funds, or for the use of the firm, as establishing these two principles: First. That such real estate is, in equity, chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another upon the winding up of the affairs of the firm. Second. That as between the personal representatives and the heirs at law of a deceased partner, his share of the surplus of the real estate of the copartnership which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate: 2 Barb. Ch. 200, 201; and at page 206 he said: "Although a court of equity considers and treats real property as part of the stock of the firm, it leaves the legal title undisturbed, except so far as is necessary to protect the equitable rights of the several members of the

firm therein." In *Pierce* v. *Trigg*, the Court of Appeals of Virginia held that land purchased by two partners with partnership funds for partnership purposes, and used as part of the stock in trade, is to be regarded in equity as partnership property; and though, if the conveyance has been made to both partners, there will, upon the death of one, pass to his heirs a legal title, yet the whole beneficial interest devolves upon the survivor, and he may sue the heirs, compel a sale and dispose of the proceeds as he would of the personal estate of the firm. The principles declared in these cases, it is said by Collyer, "are founded in sound policy and obvious justice, and the correctness of them appears to be incontestable." Coll. on Part. Sec. 135; and of this opinion was Chancellor Kent: 3 Kent's Com. 39. The case of *Jones* v. *Parsons*, 25 Cal. 100, accords in doctrine with the cases from which we have quoted.

In *Smith* v. *Jackson*, 2 Edw. Ch. 28, the vice-chancellor held, that though real estate be purchased with joint funds for partnership purposes, there is no survivorship as to the real estate, and that upon the death of one of the partners, his share, as a tenant in common, descends to his heirs, unless it is agreed by the partners themselves to consider it as personalty, and then the agreement works the change. That when real property is acquired by partners with partnership funds, and used for partnership purposes, it will not be deemed partnership property, liable to partnership debts, by the mere taking of the deed in the joint names of the partners. To render it partnership property, and liable as such, he held it must appear that it was acquired for the purposes of the partnership by some express act or understanding of the partners; in which case equity would apply the lands to pay the partnership debts. This decision, and others to the same effect, Chancellor Kent observed, appeared to him to be a sacrifice of a principle of policy, and, above all, a principle of justice, to a technical rule of doubtful authority. There is no need, he said, of any other agreement than what the law will necessarily imply from the fact of the investment of partnership funds by the firm in real estate for partnership purposes. If the partners mean to deal honestly they can not have any other intention than the appropriation of the investment, if

wanted to pay the partnership debts: 3 Kent's Com. 39, note. Chancellor Kent evidently favored the doctrine held by Lord Eldon in *Selkrig* v. *Davies*, 2 Dow. Parl. 231, 242, and in *Townsend* v. *Devaynes*, reported in 1 Mont. on Part. 97, and by Sir John Leach in *Fereday* v. *Wightwick*, 1 Russ. & M. 45, and *Phillips* v. *Phillips*, 1 Myl. & K. 649, and *Broom* v. *Broom*, 3 Myl. & K. 433, that all property involved in a partnership ought to be considered as personalty, even in the absence of any special agreement in respect to it. In the case of *Thornton* v. *Dixon*, 3 Bro. C. C. 199, Lord Thurlow held, that in the absence of any agreement or other act affecting its general character, real estate, held as part of the partnership property, retained its original character as real estate, and upon the death of one of the partners his share passed to his heir or devisee; and Sir William Grant in *Bell* v. *Phyn*, 7 Ves. 453, and *Balmain* v. *Shore*, 9 Ves. 501, adopted the same opinion. While the doctrine of the cases is somewhat conflicting, we think the principles stated by Chancellor Walworth, in *Buchan* v. *Sumner*, as rules deduced from the American decisions, are a sound and just exposition of the law on the subject (2 Barb. Ch. 200, 201); and as a corollary of these rules, the real property of the partnership may be considered and treated as part of its capital stock, leaving the legal title undisturbed, subject to the law controlling as to its alienation, descent and distribution, except in so far as may be necessary to protect the rights of creditors and of the several members of the firm. We do not think the jurisdiction of a court of equity depends for its exercise, subjecting real estate thus acquired and used by a partnership to the payment of the debts of the concern, upon an express agreement of the parties to that effect. That real property shall be subject to the purposes for which it was purchased or brought into the partnership, involves the assumption that the partners understood among themselves and intended that it should be held in trust for the uses of the partnership by the several tenants in common. This understanding may be implied from the acts or conduct of the parties. The circumstance that property, whether it be real or personal, is invested in a partnership enterprise, affords cogent evidence of intention that it shall constitute a part of its capital stock. Therefore we do

not deem it essential that such intention must be manifested by an express agreement. The agreement is implied from the circumstances, by the rules of law and logic; and it is only equitable to the creditors and members of the partnership that the property should not be withdrawn until the affairs of the association may be adjusted and each of its members shall have his just due: 3 Kent Com. 39, note.

A portion of the real estate involved in the controversy, as we understand the case, was acquired by the persons originally interested prior to their actually engaging in the business of mining, and it may perhaps be supposed the authorities cited do not therefore apply. If such mining ground was obtained by the parties solely for the purpose of extracting gold from it, and for that object was brought into the partnership as its capital, it must be regarded as partnership property in the qualified character already expressed. The land being obtained for the sole object of mining, and invested in the mining partnership, it is impossible on principle to distinguish it as resting upon any other footing in its relation to the partnership than mining land acquired by the partnership for mining purposes after the joint enterprise is fully in operation: *Crawshay* v. *Maule*, 1 Swanst. 523; Coll. on Mines, 88; Rockwell on Mines, 578. Mr. Rockwell, after noticing what was said by Sir John Leach in *Fereday* v. *Wightwick*, observes that "it may be concluded that when persons acquire interests in lands apparently for the sole purpose of working the mines in them, they must be considered as entering into a commercial partnership. There does not appear," he continues, "to be any ground for distinction in such cases, if the parties have even acquired a permanent and absolute interest in the property." But he submits it as a general rule in such cases that "there must not only be an express intention to work the mines, but this object must have been either solely contemplated by the parties, or of such paramount consequence as to effectually over-balance any other advantages anticipated from the estate." This, in our judgment, refers the rule to a principle just in itself and easily to be understood.

In support of the right of the plaintiff to the relief which he seeks, as well as to the doctrines which, it may be, are

already sufficiently sustained by the foregoing authorities, we may refer more at length to the judgment of the court in the case of *Fereday* v. *Wightwick*. From the report of that case it appears that six persons had taken a lease for years of mines, and also another lease of the surface of the property, and had worked the mines as a joint concern. One of them mortgaged his interest or share for money borrowed, and then became bankrupt, at which time he was greatly indebted to the concern, of which he had been the manager. A bill was filed by such of the original partners as continued to be interested in the concern, and by other persons who were either representatives of deceased original partners or claimed as purchasers of shares. The plaintiffs sought a decree directing the share of the partner who had become bankrupt to be applied in repaying the debt due from him to the partnership. The defendants, who claimed under the bankrupt partner, insisted that the common principles of partnership were not applicable to the case of mines, which were of the nature of real property. In deciding the case, the master of the rolls, Sir John Leach, said: "The mines and surface were used with a communion of expense and a communion of profit. The first question is, whether this is partnership property, liable to be sold and disposed of to pay the partnership debts; and whether a partner, having sold part of his share, his interest is to be considered subject, in the first place, to repayment of what is due from him to the partnership. This question is concluded by authority, but I am willing to decide it upon principle. Mining concerns are to some purposes trading concerns, but they are not so to all. They are not so in this particular, viz.: that they are not, as an ordinary partnership trade, subject to dissolution on the death or bankruptcy of any of the partners, and the shares are transferable without the consent of the partners. In these particular instances they have not all the incidents of a trading concern; in other respects, it has been repeatedly held that they have. Now, it is a universal principle in regard to all property, whether real or personal, acquired for the purpose of a partnership, that property so acquired is, upon the dissolution of the partnership, subject to sale and accounts between the partners, and to payment of the partnership debts; that is a universal principle. To apply the

rule to this particular case the property was acquired by these partners for the purposes of the partnership concern. Therefore, though in the nature of real property, it is subject to all the debts of the partnership, and subject to the debts of one of the partners incurred in the administration of the property. There can be no doubt, therefore, that the plaintiffs have a right to make this claim." Taml. 250; Coll. on Mines, 128.

In the case before us the plaintiff had a lien upon the partnership property for the debts due he creditors of the concern, and also for moneys advanced by him for its use, and such lien subsisted after the conveyance made by Burt to Depuy and Burrell, unless it was lost by reason of their having become purchasers in good faith, for a valuable consideration, without notice on their part of the existence of such lien. In their answer they claimed the benefits accruing to innocent purchasers in such cases.

It appears from the finding of the court that Depuy had actual notice at the time from Burt that he was in debt on the partnership account in a considerable sum, though it did not appear that Burrell had such notice. It also sufficiently appears that at the time of Depuy's and Burrell's purchase the plaintiff and Burt were prosecuting the mining business upon these mining grounds. While we do not undertake to say in this place that one partner may not convey or charge his interest in mining ground, on his private account, to the extent of his legal title, provided the purchaser or mortgagee deals with him in good faith and without notice of the partnership rights, and there is nothing in the transaction or in the circumstances connected with it or the subject-matter of it from which notice might be inferred (Coll. on Part., Sec. 135), yet if a purchaser or mortgagee in such case is apprised of facts sufficient to put him on inquiry and to lead him by a diligent investigation to a discovery of the truth, he will be deemed to have notice of the truth as it may be. Here the defendants Depuy and Burrell were necessarily aware of the working of these mining grounds by plaintiff and Burt as mining partners, and it was their duty to ascertain, as they might have done, the condition of the affairs of the concern, and whether or not there existed upon the property which they purchased a lien resulting from

the relation of the partners to each other and to the creditors of the partnership. Besides this, one of the parties had actual notice of the existence of the partnership lien of the plaintiff. They must, therefore, be deemed to have taken the property *cum onere*—subject to an adjustment of the account between the partners and the payment of the partnership debts, and also of the amount due the plaintiff on the partnership account.

The judgment must be and is hereby reversed, and the cause remanded for further proceedings.

SAWYER, J., concurring:

The determination of the rights of the parties to this suit depends upon the question whether the property was held in the ordinary mode of holding ditches and mining ground in this State as tenants in common, or held as partnership property in the strict sense in which these terms are used in relation to mercantile transactions. I have no doubt that mining claims, ditches and lands, may be held as partnership property, as well as any other, and when so held, for the purposes of discharging the partnership obligations or settling the partnership affairs, that such property will be subject in equity to all the incidents of other partnership property. The title to claims may be held by parties as tenants in common, while there may be a strict partnership for the purpose of working them; or there may be a partnership both in the ownership and in the working of the claims. Whether the relationship of the parties is one or the other, or neither, must depend upon the facts of each particular case. These principles are distinctly indicated in *Bradley* v. *Harkness*, 26 Cal. 76. Parties purchasing the interest of one of the copartners in partnership property acquire such interest only as the vendor had, and that is, his share of the residue, after the affairs of the concern are wound up and the debts paid, including the balance due one partner from the other on the partnership account: *Jones* v. *Parsons*, 25 Cal. 104. And this rule in equity applies to real estate constituting a part of the assets of the firm, as well as to personalty. True, if the record legal title to realty be in one of the partners alone, and he should convey to an innocent party for a valuable consideration without notice of the trust, such party might take a

title under the recording acts; but whether he would or would not, would depend upon principles having no peculiar relation to partnership rights. In such case, also, all the rules of law relating to possession, as affecting the question of notice, would doubtless be applicable as in other cases between individuals having no connection with partnership transactions. And these rules would doubtless obviate many of the difficulties suggested by the learned judge who tried the case.

The finding in this case is an opinion rather than a finding, and liable to the criticisms suggested in *Hidden* v. *Jordan*, 28 Cal. 305; but from the facts stated I think there was a partnership in working the mines, and that a large portion at least, of the property in question, was partnership property. Much of it, including a considerable portion of the claims and of the water rights, was purchased by the two parties interested with the common funds resulting from the joint working of the claims and from the common proceeds of sales of water. The profits and losses were to be shared according to their respective interest. This state of facts, without any specific agreement modifying the rights of the parties, would constitute the property so purchased, and the proceeds of the same and of their joint labor, partnership property. As to this portion of the property the judgment is, therefore, erroneous.

It may be that the claims before owned and purchased in severalty in undivided interests were held by them throughout their connection as tenants in common. Whether they were or were not is not distinctly found as a fact, and we should not be justified in determining the question from the facts found. Those interests were doubtless originally purchased as tenancies in common; but whether from the evidence before the court, and the manner in which the parties blended their interests in those claims with their subsequent purchases and in working the whole, the court would be justified in finding that they put in the claims originally held with the new purchases as partnership property, it is not our province now to determine. This will be a fact to be determined on the new trial. If so, it became partnership property, and subject to all the incidents of such prop-

erty. If not, and it was originally held and still continues to be held as a tenancy in common, then it was not partnership property, and the plaintiff has no claim to have the sum due him from his cotenant or copartner in other matters charged upon it.

The complaint alleges a partnership, and seeks a dissolution and settlement of the affairs of the concern. It avers all the property to be partnership property. On the next trial it will devolve upon the court to determine the facts whether a partnership existed or not; and if so, whether the whole, or only a part, and in that event, what part of the property described in the complaint is partnership property; and unless other equities appear requiring a different disposition, to subject that part to plaintiff's demand in case any balance shall be found due him on partnership account.

For these reasons I think the judgment must be reversed and the cause remanded.

BINNEY v. THE INCE HALL COAL AND CANNEL COMPANY.

(35 L. J. Ch. 363. Before the Vice Chancellor, 1865).

Attempted restriction upon transfer of shares. A company's deed provided that the company should not be affected by notice of any trust, and that where any share should become vested in any person, for any interest not absolute, the receipt of the shareholder should remain a sufficient discharge: *Held*, that the equitable mortgagee of shares had a right to sue the company.

[1] **Net profits defined.** Net profits, properly so called, are to be ascertained by putting a value on all the assets of the company of whatever nature, and deducting therefrom all liabilities, including among such liabilities the amount of the contributed capital, the surplus then remaining being net profits.

Distribution of profits set apart as continuing capital. Circumstances considered under which net profits may, at the wish of the majority of shareholders, be applied in repayment of contributed capital, although the deed of settlement seems to contemplate a continuing capital, as in an ordinary partnership; there being, however, no express prohibition in the deed.

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[1] *Fletcher* v. *Hawkins*, 11 M. R. 290.

The Ince Hall Coal and Cannel Company was formed in 1848, subject to the provisions of the act 7 & 8 Vict. c. 110, for the purpose of working certain collieries near Wigan. Its nominal capital consisted of 2,100 shares of £100 each.

Under the deed of settlement it was arranged that William Lancaster, in consideration of his prior interest in the property taken by the company, should be deemed the holder of the first 420 shares, in respect of which he was to be exempt from all liability to contribute calls or installments of capital. The working capital of the company consisted entirely of installments contributed by the shareholders, subject to the provisions contained in the 7th article, which was as follows: "When and as often as any installment of capital shall be raisable under the provisions of these presents, the same shall be contributed by the person or persons for the time being entitled to or interested in the shares in the company, in such manner as that an equal portion of every such installment shall be contributable in respect of each share in the capital of the company, except that during such time as the said William Lancaster, his executors or administrators, shall be a shareholder or shareholders in the company, in respect of any of the said 420 shares to which the said William Lancaster is hereinbefore mentioned to be entitled, he, the said William Lancaster, his executors and administrators, shall be exempted from all liability to contribute to any installment of capital which otherwise would be contributable in respect of such shares, or any of them, unless he or they shall choose to contribute the same."

This exemption was not to extend to any transferee of his shares, the article providing in respect of such transferee: "That if any sum or sums shall have been repaid to the said parties hereto out of the profits of the said partnership, or otherwise, in or toward discharge of the installments of capital paid by them respectively, then the transferee or transferees of any of the shares of the said William Lancaster, his executors or administrators, shall only be called upon to pay such sum per share as shall be equal to the installments then standing to the credit of the other shareholders for the time being, in respect of each of their respective shares." It was also provided that in the meantime Mr. Lancaster was not to

receive the £5 per cent. interest to which the other shareholders were entitled on the amount of their contributed capital, but that notwithstanding his non-payment of calls he was to stand in precisely the same position as the others with reference to the distribution of profits in respect of his shares.

The 8th article then provided as follows: "As between the company and the shareholder who shall contribute to the capital thereof, in pursuance of the clause or provision for that purpose lastly hereinbefore contained, the portion of capital from time to time contributed by each shareholder, together with interest thereon at the rate of £5 per cent., to be computed from the time or respective times when the same shall be advanced, shall be deemed a debt due and owing to him or her from the company, and shall, on the dissolution of the company, be repaid to such shareholder out of the funds and property of the company, or in case the same shall prove insufficient for that purpose, then by the shareholders for the time being, in proportion to their respective shares in the capital of the company, in such or the like manner in all respects as if the same had constituted debts owing by the company to other persons."

The 17th article provided, "that no division of the profits of the company, or any part thereof, should be made amongst the shareholders, until provision had been made thereout for payment of interest in respect of certain debts (specifically mentioned) and also in respect of the debts for the time being owing from the company to the shareholders in respect of advances of capital as thereinbefore mentioned."

The other clauses of the deed material to the suit were contained in the 32d and 142d articles, and provided as follows:

32. "Any ordinary general meeting of the company may, from time to time, after directing proper provision to be made for answering and satisfying the debts and liabilities of the company, or so much thereof as shall for the time being be payable or accrue due previous to the next annual general meeting, and also after directing such sum to be appropriated as such meeting shall think desirable as a reserve fund to provide for any or all of the ordinary or extraordinary expenses of the company, or to extend the operations of the company,

determine the proportion of the clear gains and profits to be from time to time divided amongst the shareholders."

142. "The company shall not be affected by notice of any trust relating to any share or shares in the company, but in all cases where any share or shares shall be bequeathed or assigned to or otherwise vested in, or covenanted and agreed to be bequeathed, assigned to, or otherwise vested in any person or persons, in trust for any other person or persons, or shall be bequeathed to or otherwise be vested in any other person or persons for any interest, not being an interest absolute, the receipt of the person who for the time being shall, under the provisions herein contained, be the shareholder of such share or shares, shall, notwithstanding any claim or demand whatsoever which any other person or persons may have in respect of the said share or shares, be a good and sufficient discharge for the money which may become payable from the company in respect of the said share or shares, and shall discharge the company and the shareholders thereof from all obligation to see to its application, or from being answerable for its misapplication or non-application."

In 1860 Lancaster assigned his 420 shares, by way of mortgage, to a trustee for the company. In 1862 he further charged them as security for £3,000 and interest, by way of equitable mortgage to the plaintiff. Notice of this charge was given to the company. Lancaster had never contributed any installment of capital in respect of his shares.

At a general meeting of the company, held on the 20th of August, 1864, it was resolved: (1) "That a reserve fund be formed out of the gains and profits of the company for the purposes mentioned in the deed of settlement, and that for the purpose of commencing the formation of such reserve fund the directors be empowered to set apart a sum of £3,000 out of the gains and profits of the company." (2) "That the directors of the company be empowered out of the gains and profits of the company to apply the sum of £10,101 toward the discharge ratably of the installments of capital which have been paid by the several shareholders of the company." (3) "That a dividend be declared at the rate of £2 per share upon the shares standing upon the register, to be payable out of the clear gains and profits of the company, for the period ending the 30th of June last."

Lancaster, whose rights under the deed of settlement had previously been the subject of controversy between himself and the directors, was present at the meeting, and protested against the application of the £10,101 contemplated by the second of the above resolutions.

The plaintiff, as equitable mortgagee of Lancaster's shares, shortly afterward instituted the present suit to restrain the company from carrying the resolution into effect, and praying that the said sum of £10,101 might be declared to be clear gains and profits of the company, and, as such, applicable to the payment of dividends on the shares in the company; also that a receiver might be appointed of the dividends payable in respect of Lancaster's shares, without prejudice to the rights of the first mortgagee.

The bill was filed against the company, the first mortgagee, and Lancaster, the mortgagor. An interim order was obtained upon an interlocutory application; but in consequence of the death of Lancaster, in May, 1865, the suit became defective. It had since been revived by making his representative a party, and the cause now came on for hearing.

The company and the first mortgagee, without demurring to the bill, submitted by their answers that the plaintiff had no right to institute proceedings in equity.

No evidence was produced as to the actual state of the company's affairs.

Mr. OSBORNE and Mr. WALLER, for the plaintiff.

Mr. WICKENS for the representative of Lancaster.

Mr. ROLT and Mr. EDDIS for the company.

Mr. BAILEY and Mr. G. B. FINCH for the first mortgagee of Lancaster's shares.

KINDERSLEY, V. C., then gave judgment as follows:

The main object of this suit is to obtain an injunction to restrain the Ince Hall Coal and Cannel Company from applying the sum of £10,101 toward the liquidation in part of the share

capital of the members. There are other collateral objects to which I will refer presently. The circumstances are peculiar in this respect, that although the company was constituted mainly on the footing of a joint stock company, in some respects it had from the first the elements of a common partnership. It was a joint stock company so far as the division of its capital into shares, and the power which each member had of transferring his shares without the concurrence of every other shareholder; but it had an ingredient of common partnership in respect of that arrangement, by which the amount of contributed capital (making when it was all paid up, as it has been, £210,000) was to be treated as so much capital to be paid back to the parties contributing it, whenever the company should come to a termination and be dissolved. That is, of course, a very unusual clause in a joint stock company's deed, and constitutes the peculiarity of this case. Then, there is a further peculiarity in the position of Mr. Lancaster. It appears that he had some prior interest in the coal mines and works which were to become the property of the company, and he must be considered as having been one of the promoters of the concern. In consideration of this he was to have 420 shares (one fifth of the whole number), not precisely as paid up shares, but such that he was not to be liable to pay up any call or installment in respect of them; if, however, he ever parted with those shares or any of them, by transfer to a purchaser, the transferee was to be liable to pay upon those shares the same amount of capital as had been contributed by other shareholders respectively. In the meantime Mr. Lancaster was not to receive the £5 per cent. interest to which the other shareholders were entitled upon the amount of their contributed capital (as in the case of ordinary partners advancing capital), but notwithstanding his non-payment of calls he was to stand in precisely the same position as the others with reference to the distribution of profits in respect of his shares. Now, it appears to me, upon the whole view of the provisions in this deed, that the original intention of the parties was that the contributed capital should be paid off at the termination of the company; but I can not see how it would be inconsistent with such an intention to pay it off either wholly or in part during the continuance of the company.

Certainly I find no express clause prohibiting such a course, nor is there any express obligation to divide as dividends the residue of actual profits, even after setting apart that reserve fund (which it is admitted beyond dispute that the company was authorized to do under the 32d clause of their deed) to answer any extraordinary expenses that might be sustained through accident or emergency of any kind in carrying on the concern. It would be strange if they did not divide the residue of the profits, because it would, in fact, amount to putting by another reserve fund; but there is nothing in the deed to prevent their so doing.

But, then, no fund could properly be set apart, either for reserve or for division among the members of the company, unless it consisted of net profits strictly so called; and in the course of the argument upon this present case I think that we have arrived at a very clear perception of the principle upon which the directors and the company were bound to act in ascertaining such net profits. The first step would be to make good the capital by taking stock and putting a value upon all the assets of the company, of whatever nature, and deducting therefrom all the liabilities (including amongst those liabilities the amount of contributed capital,) and the surplus, if any, then remaining of the gross receipts would be net profits. Now, assuming for the present that this sum, which the company have thought it necessary to keep back from division among its members and to apply, not as a reserve fund, but toward the liquidation of the share capital, represented part of the stock or capital of the concern, I do not see how it could be to the prejudice of Mr. Lancaster, in contradistinction to the other shareholders, to apply that money in reducing the capital, which was, in fact, a debt of the company. The only suggestion that I have heard tending that way was made by Mr. Osborne in reply, namely, that it is for the interest of all the shareholders to have sufficient working capital. No doubt it is. But it would be extremely detrimental to the shareholders if they were compelled to keep up a larger capital than they wanted to work with, or than they could safely employ; and I can not find in this deed anything which precludes that general right of the company to determine by a majority what shall be their course of management in this re-

spect. The anomalous position of Mr. Lancaster does not seem to me in the smallest degree to put him in a different situation from the other shareholders with regard to the advantage or disadvantage of applying a part of the capital (that is, of the money which has been kept back representing capital) in discharge of the share capital, because he is obliged to contribute his quota toward the annual payment of the interest on that share capital, and he will be liable ultimately to contribute his proportionate share toward the repayment of the principal at the dissolution of the company. It must be recollected that I am for the present taking the case, not of money which might be divided as profit, but of money which represented capital and which must be set apart before the profit could be ascertained.

But now comes the question, what is it that the company is intending to do? I can not lay my finger on any evidence, nor has any been furnished, which enables me to say that they were proposing merely to apply capital, or what ought to be kept back as capital, in discharge of the contributed share capital. Yet there is no evidence, on the other hand, to show that they were meaning to confine themselves to that. My impression is that the company passed this resolution without keeping in their minds that clear view, which I think I am justified in saying we have all now arrived at, as to what is really the mode in which this company ought to be worked with respect to the present question. I have no means before me of knowing whether this £10,101 was money which might be treated as profit, that is, what would remain after setting apart sufficient to satisfy the whole amount of capital, including the value of the assets, or whether it was not. I believe, in fact, tha it has never been considered by the directors whether it was so or not. In this state of things the only course I can take is to ascertain what is the fact. One mode of doing that would be for the directors or their secretary to make an affidavit; but then, I think there ought to be an opportunity given to the plaintiff, who does not belong to the company, of seeing how the inquiry is conducted; and therefore I shall direct an inquiry for the purpose of ascertaining what was the amount of net profit for the half year preceding the date of the resolution; and I think the

inquiry should be prefaced by a declaration that the company are not authorized to apply any part of the net gains and profits (specifying the principle upon which those gains and profits are to be ascertained) toward the liquidation of any part of the share capital.

I now come to consider the plaintiff's position. It has been contended that he has no right to come here at all; and I have been referred to the 142d clause of the deed, upon which it has been argued, in effect, that the company may repudiate the plaintiff and say he has no right to bring them into a court of equity for any relief against them at all. But it appears to me that such a contention really can not be maintained, because the effect of that clause is not that the company is not to be affected by a trust, or that no trust is to be created on any share, but that the company shall not be affected by any notice of any trust; that is to say, although they may have notice that A is a shareholder, and B is a *cestui que trust*, payment of dividend to the person standing on the books shall, notwithstanding the notice of the trust, be a good discharge. That is the whole effect of this clause. But it does not preclude a *cestui que trust* of A's shares from coming and saying, "Do not pay my trustee the moneys as if they belonged to him, but pay them to me." Nor does it preclude the plaintiff from coming to the company and saying, "You are injuring these shares in respect of a right which attaches to them; you have no right to make this application of the profits against Mr. Lancaster, my trustee, and therefore you have no right as against me." It appears to me that there is nothing in this deed to prove any such right on the part of the company; in fact, it would be enabling a company to take upon themselves to say, "We will by our deed make a provision that whatever injustice we choose to perpetrate there shall be no remedy against that injustice in any court of equity." I am not saying that the company is doing anything of that kind; I am only putting it at the extreme. Therefore I think that the plaintiff has a full right, first, as between himself and Mr. Lancaster against the company, to say, "You must not pay Mr. Lancaster any portion of dividend, but must pay it to me instead." And, if necessary, a receiver must be appointed not to receive anything belonging to the company,

but only to receive from the company, and intercept from Mr. Lancaster, that which would otherwise be paid to Mr. Lancaster. And then the plaintiff has, I conceive, a right to say, "If the company is taking any part of the profits which belong to these shares of Mr. Lancaster, and is appropriating them in a manner in which it has no right to appropriate them in paying off capital to the detriment of Mr. Lancaster's shares, I shall go into a court of equity and seek to restrain the company from doing that."

Now then, the only other thing I have to advert to is the position of Mr. Baily's client, the first mortgagee. It seems to me that he was really not a necessary party to this suit at all, because no relief can be had against him in respect of that mortgage which he holds, and even if he were a necessary party for the purpose of enabling the plaintiff to work out his remedy, still the plaintiff must pay his costs. It may be said that it was important that the court should be informed of the existence of the prior mortgage; but it being clear that I can make no decree in respect of it, I must dismiss the bill with costs as against the first mortgagee. The injunction must be continued until further order, and a receiver appointed of the dividends payable in respect of Lancaster's shares, without prejudice to the rights of the first mortgagee.

Declaration and inquiry as above directed.

PHILLIPS v. REEDER ET AL.

(18 New Jersey Equity, 95. Court of Chancery, 1866.)

[1] **Partner holding lease with privilege of renewal.** Where two entered into partnership to continue for three years, and so much longer as one of them, holding a certain lease of stone quarries, should continue lessee of such quarries: *Held*, that the partner holding such lease was not bound to exercise the option of renewal which such lease gave him, and that the partnership expired with the lease.

If articles of copartnership provide for its continuance during the existence of a lease, renewable at the option of one of the partners, it is at the option of such partner to continue the partnership by renewing the lease, or to end it by refusing to renew. He has a right to refuse to renew—for the purpose of ending the partnership.

[1] *Burdon* v. *Barkus*, 11 M. R. 357.

[1] **Statement of intention no estoppel.** That a partner, having the option to renew such lease and continue the partnership, may have talked and acted as if he intended to do so, will not bind him to renew if he made no contract to do it.

Division of property after dissolution. Upon the dissolution of a partnership, in which the articles provided that the effects, on dissolution, were to be equally divided among the partners, the property and effects of the firm belong to the individuals who composed it, as tenants in common; part of the former members of the firm can not dispose of the property of any other member, without his consent.

Idem. If some of the members of a dissolved partnership dispose of the property of one of the partners, without his consent, he may, at his option, call on them to account for its value.

[2] **Rights of retiring partner.** In many cases, if some of the partners, after dissolution, continue the business with the property of the late firm, the retiring partner will be entitled to call on them for a share of the profits, as well as for his capital.

Idem—Continued use of retiring partner's effects. But this principle will not be applied to a case where the chief contribution to the business was personal skill and labor and a new partnership was formed with strangers, merely because some of the property of the retiring partner was used in the new business, after being sold to the new firm by the continuing partners, without authority.

Idem—Accounting to retired partner. A majority of the partners of a firm that is dissolved have no right, without judicial proceedings, to compel another partner to sell or divide the property, or to choose an appraiser for the purpose of valuation, or, if he refuses, to choose appraisers themselves, and purchase or sell his share at such valuation. But if they have appropriated or sold the property they must account to him for the real value of his share and interest therein.

AITKIN and WILSON, for complainant.

RICHEY, for defendants.

THE CHANCELLOR (ZABRISKIE).

The complainant, Benjamin D. Phillips, entered into partnership with the defendants, Charles Reeder and Samuel Prior, by written articles, under the hands and seals of the parties, dated the 15th day of December, 1860. The partnership was to commence from the date and to continue for three years, and so much longer as the defendants should continue lessees, under the lease then existing, of three stone quarries leased to them by Cornelius V. Moore. That lease

[1] *Maye* v. *Yappen*, 10 M. R. 101.

[2] *Nerot* v. *Burnand*, 4 Russ. 247; *Payne* v. *Hornby*, 25 Beav. 280.

was dated October 30, 1860, and was for the term of three years, from January 1, 1861, with a right of renewal, at the option of the lessees, upon their having performed the covenants therein. The business of the partnership was to furnish stone for building, and to cut stone to order, and for sale. The lease from Moore was not renewed by the defendants, but they elected, before its expiration, to take a new lease from the heirs of Moore, he having died. This new lease was for only two of the three quarries, and was on terms materially different from the first lease.

The defendants insisted that the partnership expired by its own limitation, contained in the articles by which it was constituted. The three years had expired on December 15, 1863, and their term, under the Moore lease, ended January 1, 1864, when they practically put an end to the partnership, and formed a new one, with Albert K. Reeder, the son of Charles Reeder, and Thomas H. Prior, the son of Samuel Prior, to carry on a like business.

The complainant insisted that the partnership was not ended on the first day of January, 1864; that it was a partnership for six years, or for the term for which the Moore lease could have been renewed; that this lease virtually belonged to the firm, and the defendants were bound to renew it for the benefit of the firm; that the taking a new lease for part was designed to evade their contract with him, was a fraud upon him, and that they must be considered to hold it in trust for the firm, and that the partnership therefore continued.

Under this insistment, on the first of January, 1864, he declined to enter into any negotiation with them for the division or sale of the partnership property. They had it appraised, gave him the inventory and appraisement, and offered to divide it by the appraisement, to let him take one third, and they retain two thirds. They offered that he might buy their two thirds at these prices, or that they would buy his third at the same. He, believing that he was entitled to continue in the partnership, refused to assent to any of these offers, and thereupon the defendants sold all the partnership stock, at the appraisement, to the new firm, having first given the complainant notice that they would do it.

The complainant, on the 20th day of February, 1864, filed his bill to have the partnership declared to be still in exist-

ence, and to compel the defendants to go on with him as a partner, and for an account of the property and profits of the firm made and to be made; or, if the partnership should be held dissolved, for an account of the property and profits of the firm, including the profits on all contracts entered into before the dissolution, although executed afterward.

The first question to be decided is, did the partnership terminate on the 1st of January, 1864? The term of three years had expired, and the lease from C. V. Moore terminated on that day. By the terms of the articles the partnership ended on that day. The complainant contends that the partnership was intended to extend over the whole term to which the Moore lease could be renewed; that the lease belonged to the firm, and it was the duty of the defendants to have renewed it for the term provided.

But this lease did not belong to the firm, either at law or equitably. The articles of partnership do not so provide, either expressly or by implication; on the contrary, they expressly provide that the defendants shall continue to work the quarries, and furnish the firm with all the stone quarried there at cost. The provision of the lease against assignment, and the aversion of Moore to Phillips, presented a bar to his belonging to the firm. The articles might have obliged the defendants to renew that lease. They do not so provide, and this court can not add to them any additional provision, especially when the discussions between the parties about the term of the partnership, whether for six years or three years, must have suggested to them and their counsel the propriety of such a provision, if it had been intented. As the term of the partnership was made to depend upon the renewal of a lease, which the defendants could renew or not at their option, it must be construed to be for three years, and to be extended for three years longer, at the option of the defendants. If the defendants had refused to renew this lease expressly for the purpose of ending the partnership, to get rid of the complainant as a partner, and to take their own sons in his stead, they had the right to do it.

The fact that during any part or the whole of the partnership they may have expected to renew the lease and continue the partnership, and may have so said and acted, will not take

away their right to exercise their choice, unless what they said or did amounted to a new contract with the complainant. There is no proof of anything like this. The partnership between the complainant and the defendants must be held to have expired on the first day of January, 1864.

By the articles it was provided that the effects, on dissolution, were to be equally divided among the partners, one third to each. After that the defendants had no right to or power over the complainant's one third. They were merely tenants in common; neither could set off or sell the share of the other without his consent. The sale, therefore, made by the defendants to the new firm, is not valid as far as the interest of the complainant is concerned. In this suit there can be no recovery against the new firm, as they are not parties. But the defendants have undertaken to sell and dispose of the interest of the complainant, and therefore they may be held to account for it. They must account to him, not at a value fixed by themselves, or appraisers chosen by them, but at the real value, to be ascertained by evidence, on a reference to a master.

The complainant claims a right to his share of the profits made by the new firm, on the ground that the business was continued with the stock and capital of the old firm, and that his property was put to risk in making these profits.

There is a series of cases to sustain the principle that where one or more of the partners of a firm continue the business after the partnership has been dissolved, by death or otherwise, the retiring partner, or the legal representatives of the deceased partner, are entitled to his share of the profits made after dissolution: 3 Kent, 64; Collyer on Part. § 324; Story on Part. § 329, 342; Lindley on Part. (93 Law Lib.) 830 to 837; *Brown* v. *Litton*, 1 P. Wms. 140; *Hammond* v. *Douglas*, 5 Ves. 539; *Crawshay* v. *Collins*, 15 Ves. 218; 1 Jac. & W. 467; 2 Russ. 325; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Brown* v. *De Tastet*, Jacob, 284; *Wederburn* v. *Wederburn*, 2 Keen, 722; *Palmer* v. *Mitchell*, 2 M. & K. 672; *Stocken* v. *Dawson*, 9 Beav. 239; *Featherstonhaugh* v. *Turner*, 25 Beav. 382; *Simpson* v. *Chapman*, 4 De G. Mac. & G. 154; *Stoughton* v. *Lynch*, 1 Johns. Ch. 467.

But the application of this principle could hardly be made

in the present case; there are many limitations and qualifications to it, and it is always applied "with just allowances."

In a case like this, where the main contribution to the success of the firm by each partner was his skill, time and diligence, which each contracted to devote exclusively to the business, it would be difficult, if not impossible, to decide what allowance ought to be made for the skill and services of the two new partners, and what deduction for the want of the skill and services of the complainant. The later authorities limit the application of the rule.

Again, this doctrine of the equity courts was intended as a penalty, to hold to strict account, in the most severe manner, executors and others who go on wantonly trading with the capital of others in no laches or fault. In this case, it would be a severe penalty to base an account on that principle. The defendants, in this case, made offers that the complainant ought to have accepted. They asked him to divide the property according to the agreement in the articles; this division it was his right to have; it was equally his duty to them to make it. They requested him to join in selecting fair and competent men to appraise the property; this also he refused. When they had an appraisement made they offered to buy his one third, or to sell their two thirds by it; this he refused. He thought the partnership was not ended; he mistook his rights, and therefore refused to do what he ought to have done. Under these circumstances the defendants undertook to sell by an appraisement which they supposed to be fair. They also mistook their rights, or rather their power. Under these circumstances, it would be unfair to inflict a penalty on the defendants by making them share the product of their skill and diligence with one who was in no way, either at law, or in equity, or in conscience, a partner, because they made a mistake in the proper mode of transferring the title to the partnership property.

The complainant is not entitled to any account of profits earned since January 1, 1864, but he is entitled to interest from that day, on the amount found to be then due to him from the assets of the firm.

Let an order be made referring it to a master to take an account on these principles.

ANTONIO SETTEMBRE V. CHARLES D. PUTNAM AND GEORGE D. MINCHELL.

(30 California, 490. Supreme Court, 1866.)

[1] **Prospecting arrangement between claimant and adventurer.** An agreement between one or more persons who claim an undeveloped mine, and another person, that if the latter will give his labor to develop the mine the former will furnish him with tools and provisions, and give him a share in the mine if it proves valuable, followed by a joint working of the mine and sharing the profits by the parties, constitutes one of those qualified partnerships, common in California, known as mining partnerships.

Idem—Adventurer entitled to conveyance. Such a contract resulting in success entitles the adventurer to his proper share in the property.

Mine purchased by partner in trust for copartners. If two or more persons as mining partners develop a mine situated upon land owned by a third person, and they authorize one of their number to purchase the land of the owner for the benefit of all, and he buys the same in his own name, he holds the legal title of his partners' proportion in the mine in trust for them.

Sale by trustee to innocent purchaser. If one of several partners in a mine holds the legal title in the same in his own right to the extent of his interest, and in trust for his copartners to the extent of their interests, a sale made by him, without the consent of his associates, of an undivided interest not exceeding in amount the interest held in his own right, to one who had no notice of the trust, will convey only the title of the grantor, and not the interests of the *cestuis que trust*.

Parties to action between mining partners. Where two of three partners in a mine make a contract with a person not interested in the same, by which he becomes entitled to a share of their interest, and a like share of the profits of their interest, the two are the only necessary parties defendant in an action brought by the person they contract with to determine his right to a share in the mine and profits.

Parties to action to dissolve mining partnership. In an action, to take an account of a mining partnership and dissolve the same, all those owning interests in the partnership are necessary parties.

Order to bring in other parties. If, in a case in equity to dissolve a mining partnership, it appears on the trial that a complete determination of the controversy can not be had without the presence of other parties, the court may, on its own motion, order them to be brought in before final decree.

Waiver of part of relief asked for in equity. If, in an action brought against two of several mining partners to establish the plaintiff's right to an interest under a contract with the defendants, and for a conveyance with account and dissolution, the plaintiff is content with a judg-

[1] *Southmayd* v. *Southmayd*, 4 Mon. 100.

ment establishing his right and directing a conveyance, waiving account and dissolution, the court may grant that relief and give judgment, without making the other partners parties defendant.

Appeal from the District Court, Third Judicial District, Santa Clara County.

The plaintiff filed a complaint setting up the facts found by the court, and also some other facts not material to be reported. He prayed in his complaint for an account to be taken by the court of the value of all the ores removed from the mine by the defendants and of all sums of money which they had received and which had in any manner come to their use from the mine, and also of all charges and expenditures on account thereof by any and all of the partners, as well the plaintiff as the defendants, and each of them, and that the court adjudge, order, and decree that the partnership be dissolved, and that the defendants be required to pay to the plaintiff the amount which should be found to be due the plaintiff on the account, and the defendants be directed and required to grant and convey to the plaintiff one equal undivided third of the mine of North Almaden, and of all the interest owned or held by the defendants in the said mine of North Almaden, whether derived through or under the contracts with Thomas H. Farnsworth and Oliver W. Farnsworth, or otherwise, together with the rights thereunto belonging or in anywise appertaining, free from any and all incumbrances or charges, liens or alienations of any kind, made, done, or suffered by the defendants or either of them, and for such other and further relief as to the court might seem in accordance with equity and good conscience, and for all costs of suit.

The district judge rendered judgment for defendants, and gave the following opinion, assigning his reasons therefor:

"My conclusion is that the foregoing facts do not show a partnership between the plaintiff and the defendants; that the verbal agreement made by the defendants to the plaintiff to share with him their interest in the mine if it should prove to be valuable, and their subsequent fraudulent conduct in refusing to do so after he had developed it, are matters for which the plaintiff has his remedy at law or in equity, upon

a proper case to compel a specific execution of their agreement out of any interest which they, the said defendants, may have in the mine or the land n which it is. Therefore, the defendants are entitled to judgment in this case for costs.

"Judgment is so ordered."

The plaintiff appealed.

The other facts are stated in the opinion of the court.

WILLIAM MATTHEWS, for appellant.

J. M. WILLIAMS, for respondent.

By the Court, SAWYER, J.

We think, upon the facts found, that there existed between the plaintiff and defendants one of those associations, so common in this State, formed for the purpose of carrying on mining operations, and combining some of the incidents of ordinary trading partnerships, and some of the incidents of tenancies in common—a species of qualified partnerships, often called mining partnerships. The two defendants, together with one Brodie, were in possession of a portion of the "Rancho Yerba Buena y Socayre," in the county of Santa Clara, upon which they supposed they had discovered a quicksilver mine, which mine they claimed in equal shares. They had also agreed between themselves to explore and develop it. The title to the land upon which the mine was supposed to exist was in Thomas H. and Oliver W. Farnsworth.

The court found that both the plaintiff and defendants were without means; "but the plaintiff was a miner of some skill and experience, and the defendants, anxious to secure his services in prospecting the mine, verbally proposed to him that if he would accompany them and devote his time, labor and skill in exploring and developing the mine, they would supply the necessary mining tools and provisions, and give him an equal share of their interest in the mine (their interest being two thirds and Brodie's one third) if it should prove valuable."

"The plaintiff accepted this proposition, and at the same time gave to them twenty dollars with which to pay certain expenses incurred by the defendants in starting their enterprise."

"Under this verbal contract the defendants furnished the tools and provisions. Brodie was no party to the contract between the plaintiff and the defendants, but he furnished the defendants with two laborers. And the plaintiff, with the men furnished by Brodie, went to work and opened a tunnel, in which they worked for twenty-five or twenty-six days, and at the end of that time struck a ledge of quicksilver ore. The ledge promising to be valuable, the defendants and the plaintiff, upon a consultation together, concluded it best to buy from the said Farnsworths the title to the land on which the mine was located. And for that purpose, they authorized one of their number, to wit, the defendant Putnam, to try and procure the land for them (the said plaintiff and defendants). The defendant Putnam accordingly arranged with the said Farnsworths to lease one hundred acres of the land as described on page six of the plaintiff's complaint, with the privilege of buying it within six months thereafter; and on the 6th day of June, 1865, the said defendants, in their own names, and the said Farnsworths, made and executed and delivered the written lease and contract of sale of said tract of land. * * * Thereafter the said defendants claimed to be the absolute owners of the mine and of the land in which it is located, and refused to recognize the plaintiff or Brodie as having any share with them in the mine, or any right, title or interest in the land in which the mine is, but (without informing the plaintiff of the fact) considered him (the said plaintiff) there as a laborer only. And on the 13th of June, 1865, they, the said defendants, transferred to one O. L. Crandall an undivided one third of the lease and contract of sale mentioned and described in the sixth finding of fact."

Crandall, at the time he purchased in, had no knowledge of the interest of plaintiff. On the 17th of June, four days after Crandall purchased, he and the defendants entered into a further contract of a similar character with the last, embracing a larger tract, of eleven hundred acres. The said Crandall and the defendants then borrowed three thousand dollars from one John Parrott, with which they commenced working said mine, and took out ore and had it reduced at the Guadaloupe mine; and they realized from it forty flasks of quicksilver; and during all this time the plaintiff continued to work in the mine.

"The plaintiff worked at the mine from about the first of April, 1865, the time when he entered into the verbal contract with the defendants, until the 21st of July, 1865, not as a hired laborer, but under said verbal contract with said defendants; and during that time he received from said defendants sixty dollars, fifty of which were given to him when they and the said Crandall had borrowed three thousand dollars as already stated; and the other ten dollars were handed to him on the 3d of July, 1865, to enable him to enjoy the "Fourth of July." The plaintiff, when he received this money, took it, stating to the defendants that he did so on account of the share he had with them in the mine, and not in payment for his work."

"At the time of the commencement of this suit the defendants had no property except their interest in the mine and lands in controversy."

"The ores taken from the mine were sent to the Guadaloupe mine to be reduced, as stated in the within finding of fact, as security for the payment of the money advanced by Parrott to Crandall and the defendants."

Implied trust in purchase of mining ground by a partner.

Upon this state of facts, the plaintiff fully performed his part of the agreement, and became entitled to one third of the interest claimed by defendants; that is to say, one third of two thirds of the whole interest in the mining claim—Brodie having at the beginning one third, and the defendants two thirds. After developing the mine and proving its value, the plaintiff and defendants, for the greater security and the enhancement of the value of their enterprise, agreed if possible to lease or purchase from the owners the land upon which the mine was situate, and one of them was authorized to make the lease or purchase from the Farnsworths, for the benefit of plaintiff as well as defendants. But the lease and purchase were, in bad faith, made in the name of the defendants alone. There can be no doubt that the interest thus acquired in the name of defendants, to the extent of one third of the whole interest to which they were entitled, was held by them in trust for the plaintiff. Nor does it make any difference that defendant sold an interest to Crandall without notice of plaintiff's rights, and that they increased the value of the purchase

by a further contract with the Farnsworths. The defendants could dispose of their own interest, but they were not authorized to sell that of plaintiff; and after the sale to Crandall, there was still sufficient left in the names of the defendants to satisfy the claim of plaintiff; and as these contracts of lease and purchase were made in the names of defendants, in bad faith, the law impresses upon them a trust in favor of plaintiff to the extent of his interest under the agreement. The plaintiff continued to work on under and in pursuance of his agreement till July 21, 1865, long after the date of the last purchase, and after said purchases said defendants paid over to said plaintiff the sum of sixty dollars, defendants knowing that plaintiff received it at the time as a part of his share of the profits, and not as a payment for his labor. The plaintiff by reason of his interest acquired under the agreement with defendants, as between him and them, is entitled to a corresponding share of the profits of the mine. And this necessarily entitles him to an account. He is also entitled to a conveyance of one third of the interest in the mine originally held by the two defendants, and one third of two thirds of the interest acquired by the two contracts entered into between the defendants and the Farnsworths, and the defendants and Crandall and the Farnsworths. The facts showing the plaintiff's rights are all set out in the complaint, and the prayer of the complaint is broad enough to cover all the relief to which the plaintiff is entitled; and, whether the arrangement is called a partnership or not, we see no reason why the relief might not be granted in this suit, if all the parties interested had been before the court.

Parties in action to dissolve mining partnership.

The contest as to the right of the plaintiff to the interest claimed, and his share of the profits, seems to be between the plaintiff and defendants alone. Plaintiff has no agreement with Brodie. Defendants and Brodie had a claim to the mine and the possession of the land, each holding an equal share, also some sort of an agreement to explore and develop it. A sub-contract was then entered into between defendants and plaintiff, by which plaintiff was to devote his skill, time and labor to the enterprise, and in consideration thereof they

were to furnish provisions and tools, and share their interests equally with him. Brodie had nothing to do with this subcontract. It concerned plaintiff and defendants alone; consequently, Brodie had no interest in the litigation, so far as the establishment of plaintiff's right is concerned. What became of Brodie's interest after the development of the mine does not appear, yet he does not seem to have figured in the matters relating to the leases and conditional purchases from the Farnsworths, or in anything subsequent to striking the ledge. If Brodie still has an interest, and an account is to be taken, the association dissolved and the interests severed, as prayed for, Brodie and Crandall are necessary parties, for this branch of the relief sought could not be granted without affecting their interest. They are necessary parties in taking an account. It would be impossible to ascertain what share of profits would fall to the two thirds interest originally held by the defendants without taking an account as to the whole. It is true that no objection was taken in the court below, on the ground of defect of parties, and the suit need not therefore necessarily be defeated; but it is one of those cases provided for in section seventeen of the Practice Act, where it turns out upon the trial that a complete determination of the controversy can not be had without the presence of other parties, and the court is authorized, of its own motion, to order them to be brought in before a final disposition of the case. If the plaintiff insists upon an account and final settlement of the affairs of the concern when the case goes back, it appears to us, from the record as presented here, that it will be necessary for the court below to order the other parties to be brought in, in order that they may have a hearing, so far as their interests are concerned. If, however, the plaintiff is content with a judgment establishing his right and for a conveyance of the interest to which he is entitled, we see no reason why he may not waive any relief which requires the presence of other parties, and have the relief indicated awarded on the record as it now stands. Perhaps a separation of the interests of the plaintiff from that of defendants would afford sufficient protection to the plaintiff without in any other respect interfering with the association.

Judgment reversed, and cause remanded for further proceedings in the court below.

McCONNELL v. DENVER ET AL.

(35 California, 365. Supreme Court. 1868.)

Partnership relation of owners in ditch companies. Unincorporated ditch companies, organized for the sale of water, the stock in which is bought and sold at the pleasure of the owners, without consulting the co-owners, differ from ordinary commercial partnerships. Some of the incidents of a partnership pertain to such companies, and some of mere tenancies in common likewise pertain to them.

Restricted power of member of ditch company. A member of such a company has no general authority by virtue of such membership to bind the company by his contracts.

Power of superintendent of ditch company. The superintendent or managing agent of such company has no authority to bind the company by a note, given for materials used by the company, unless the authority to give such note is expressly conferred upon him by the company, or may be implied from his acts recognized by the company, with full knowledge.

[1] **Note of ditch company.** If an unincorporated ditch company authorizes its superintendent to give the company note for materials before then purchased by the company, all the members are bound by the note, whether they were such members when the materials were purchased or not.

[2] **Company contract limited to proceeds of ditch.** If lumber is furnished a ditch company under the agreement that it is to be paid for *out of the proceeds* of the ditch of the company, and the proceeds have all been faithfully applied in payment according to the agreement, the person who furnishes it is not entitled to recover the deficiency against the members of the company.

Appeal from the District Court, Sixth Judicial District, City and County of Sacramento.

January 31, 1866, the plaintiff commenced an action against the defendants on the following promissory note:

"$2,600. COLOMA, June 7, 1862.

On or before the first day of October next, the Coloma Canal Company promise to pay Samuel McConnell & Company the sum of two thousand six hundred dollars.

A. St. C. DENVER,
Secretary and agent for the Coloma Canal Co."

[1] *Jones* v. *Clark*, 11 M. R. 473.
[2] *Anspach* v. *Bast*, 12 M. R. —; *Linn* v. *Butler*, 8 Colo. 355.

The Coloma Canal Company, in the winter of 1861 and 1862, consisted of the defendants Denver, Sanderson, Donahue, Weller and Mrs. Robinson. Its property was a ditch for the conveyance of water, on the north side of the South Fork of the American river, in El Dorado county. The capital stock of the company was forty-two thousand dollars, divided into eighty-four shares of five hundred dollars each. To each owner of stock a certificate like the following was issued:

"COLOMA CANAL COMPANY.

"*No. Shares*, 84. [54] *Par Value*, $500.

CAPITAL STOCK $42,000.

"To N. W. CHAPMAN:

"*This certificate* entitles you to one share in the COLOMA CANAL COMPANY, the same having been registered on the books of the company this the 7th day of September, A. D. 1852.

"S. S. BROOKS, Secretary. FRANCIS CLARK, President."

Mrs. Robinson owned twenty-five shares, but prior to June 2, 1862, for about one year, the same had been in the hands of defendant Latham, as a pledge to secure money she owed him. On said second day of June Latham became absolute owner of the stock. For several years prior to 1861 the company had been transacting business, and during most of the time, particularly for three years before and during 1861 and 1862, defendant Denver had acted as superintendent. The company, before 1861 and 1862, had not been in debt. In the winter of 1861 and 1862, during the flood, a portion of its flume was washed away. The plaintiff and Samuel McConnell, who were at that time partners, under the name of Samuel McConnell & Co., at request of defendant Denver, furnished lumber for the company, which was used in the repair of the flume. On the day of the date of the note Denver, at request of the plaintiff, gave the same. Before the action was commenced there had been several payments made on the note, as follows: April 9, 1863, five hundred dollars; October 28, 1863, two hundred dollars; June 4, 1864, two hundred dollars; June 17, 1864, two hundred dollars; September 5, 1864 one hundred and sixty-two dollars and fifty cents; May 1, 1865, eighty-one dollars and twenty-five

cents; and June 5, 1865, eighty-one dollars and twenty-five cents. Samuel McConnell died in 1865, and plaintiff sued as his surviving partner.

The court dismissed the action as to defendant Latham, and rendered judgment against the other defendants, except defendant Weller, who had not been served with summons.

The defendants, against whom judgment was rendered, appealed, and the plaintiff appealed from that portion of the judgment in favor of defendant Latham.

The other facts are stated in the opinion of the court.

BOWIE & CATLIN, for defendants and appellants.

ROBERT ROBINSON, for plaintiff and respondent.

By the Court, SAWYER, C. J.

We think the evidence insufficient to justify the third finding, to the effect that the defendants executed the note upon which the action is brought, by their agent, Denver, and that said Denver had full power and authority to make and execute said note, by virtue of his being a partner in and agent for the company.

There is no conflict in the evidence as to the material facts in the case, and it shows that the defendants constituted one of the ordinary unincorporated ditch companies so common in the mining regions, owning a ditch which conveyed water from a certain stream to a distant mine, for sale to the miners for mining purposes. The interests were held by the owners in different proportions, in shares, represented by certificates of stock, which were bought and sold at the pleasure of the owners without consulting their co-owners. The ordinary relations of the stockholders in these associations, like those in the usual mining companies organized and conducted upon similar principles and sometimes called mining partnerships, are not those of strict commercial partnerships, but are more in the nature of tenancies in common: *Bradley* v. *Harkness*, 26 Cal. 77; *Skillman* v. *Lachman*, 23 Cal. 201; *Duryea* v. *Burt*, 28 Cal. 587; *Abel* v. *Love*, 17 Cal. 237; *Settembre* v. *Putnam*, 30 Cal. 493. Some of the incidents of a partnership pertain to them, and some of mere tenancies in

common; but thepowers of the several members by virtue of being members are different from those of commercial partnerships. A member of one of these associations has no general authority, by virtue of such membership, to bind the company by his contracts. Nor has the managing agent any authority other than that conferred upon him, either expressly or by necessary implication from his acts recognized by the company, with full knowledge of the acts at the time of the recognition: *Skillman* v. *Lachman*, *supra*. The finding of the court evidently resulted from overlooking this distinction between commercial partnerships and associations of this character. The remarks of the court in *Skillman* v. *Lachman* are in point: "But there is still a more important objection to the findings and judgment in this case. There was no evidence of any authority having been given by the company or Lachman to Sprout, a member of the company, and the managing agent, or foreman, to execute a promissory note in the name of and binding the company, for the indebtedness due the plaintiff, or any general authority to that effect. In fact, several members, including Lachman, testified that they never gave any such authority. It is clear that the law does not, in the case of mining partnerships, imply any such authority, either to a member of such partnership or to its managing agent. In this respect the law is different from that of ordinary commercial partnerships. It was clearly the duty of the plaintiff to prove that the person executing the note in the name of the company had power and authority to do so. He might have had power to purchase the lumber for the use of the mine, but that is very different from authorizing him to execute a note in the name of the company bearing interest at the rate of three per cent. per month." 23 Cal. 207.

So, in the present case, there was not only no evidence to show that Denver had express authority to execute the note, but it was affirmatively shown that he had not; and it was further shown that one of the members at least, who is defendant, had expressly declared to him that he would not consent to the incurring of any personal responsibility in any form whatever. The making of notes was no part of the ordinary business of the company, nor was it a necessary

incident to its business, nor the practice of the company in conducting its business. It owned a ditch and sold water, and those who managed it collected the moneys paid for water, paid the various expenses out of the receipts, and divided the balance among the owners. This, according to the testimony, was the regular course of its business for a series of years, from somewhere about 1854 down to 1862, when the note in suit was given. There is nothing to show that any authority was ever given to the managing agent, either expressly, or by necessary implication, to execute notes, or that any such authority was ever recognized by the stockholders. Only two instances, besides the one in question, of giving a note by the managing agent, are shown during the whole existence of the company, and these two notes were connected with the same general transaction as the one in suit; and so far as the evidence shows these were also given without the knowledge or assent of the owners, other than the agent himself. The agent testifies that the instances referred to are the only ones that occurred during his management. In the case now in question, the agent also testifies that when Samuel McConnell asked him for the note he informed him that he had no authority to execute one. He further testifies that the arrangement, in fact, was, that the lumber, for which the note was given, was furnished for the extensive repairs of the ditch, made upon the express agreement that it was to be paid for out of the proceeds of the sales of water; and it appears that the proceeds were all applied in payment. The evidence shows that the owners, so far as they were informed upon the subject at all, were informed that this was the arrangement, and none of them knew of or assented to the execution of any note at all.

We think the evidence not only shows that there was no express authority given to Denver to execute the note in suit, but, also, that none can be inferred from the general course of the business of the company, or implied from any authority exercised by the agent with the knowledge or assent of the owners. It also appears that such as expressed their views positively refused to allow any personal responsibility to be incurred in making the large repairs required by

the damage done by the floods of 1862, and that Samuel McConnell, when he took the note, was expressly informed by Denver that he had no authority to execute it. The case is clearly within the decision of *Skillman* v. *Lachman*, before cited.

Upon the findings, the judgment should have been against Latham, as well as the other defendants. The note purports to be the note of the company, and the third finding is that Denver had authority to make and execute the note. The sixth finding is entirely consistent with the third, and finds that Latham was a member of this company at the time of the execution of the note sued on. If he was a member when the contract sued on was made, and the contract was executed by a party duly authorized, he must, of course, be bound by it, as well as the other members.

The judgment and order denying a new trial must be reversed and a new trial had, and it is so ordered.

Mr. Justice SANDERSON, being disqualified, did not participate in the decision.

SLEMMER'S APPEAL.

(58 Pennsylvania State, 168. Supreme Court, 1868.)

[1] **One partner may at any time withdraw** and cause a technical dissolution of the firm, subject to liability to his partners if the act be wrongful.

Cause of dissolution—Discretion. In a suit in which the prayer of the plaintiff was for a dissolution of the partnership existing between himself and defendants, and for an appraisement and conveyance of the firm effects, etc.: *Held*, that a wide discretion is vested in courts of equity upon questions relating to the dissolution of partnerships, but when irreconcilable differences exist, which preclude harmonious and successful operation of the business by the partners, a court of equity will decree a dissolution.

Idem—Preservation of the business. In making such a decree the court will consider not merely the terms of the express contract between the partners, but also the duties and obligations implied in every partnership contract. Where a valuable business has grown up by the labors and contributions of all, the court should be careful to preserve it, and put all the partners on a fair and equal footing to compete for it. To appoint

[1] *Fletcher* v. *Reed*, 131 Mass. 312.

a receiver, direct a sale of the whole, and a winding up of the business, would destroy its value without benefiting either party.

[1] **Laches affecting equities between copartners.** One of a firm of oil refiners purchased in his own name a lot on which to erect a refinery; the firm took a lease of it from him, and erected buildings on it: *Held*, that after accepting such lease, erecting the buildings, and delaying for years to assert title until the relations of the parties became altered and complicated, it was too late for the firm to claim relief in equity by bill calling for a conveyance.

The maxim *vigilantibus non dormientibus leges subveniunt* applies in equity as well as law.

Appeal from the decree of the Court of Common Pleas of Montgomery County. In Equity.

This was a bill filed March 12, 1866, by Henry T. Slemmer against Jacob C. Slemmer, William Slemmer and Charles Slemmer.

The bill set out that the plaintiff and defendants, on the 5th of January, 1861, entered into articles of partnership, for the mining and sale or refining of petroleum, which articles were, from time to time, altered and varied by subsequent agreement.

The papers referred to in the opinion are: The articles of copartnership, dated January 5, 1861; the lease of June 5, 1862, and a letter signed by the defendants and addressed to the plaintiff, dated January 25, 1866, to wit:

Articles of Copartnership.

Artieles setting forth an agreement verbally entered into by the undersigned in the summer of 1860, for the mining for, and disposition of, by sale or refining, rock oil or petroleum in Pennsylvania and Virginia.

1. That each party shall bear an equal part of the expense and receive an equal part of the profits resulting from the undertaking, except experimental refining operations, for which the company erect and own the apparatus, but the experimenter to obtain and own the oil so experimented with.

2. Nothing to be undertaken without the assent of all parties; but a work commenced to be prosecuted, unless all parties agree to suspend or abandon.

3. Each member of the company shall advance money for

[1] *Stout* v. *Seabrook*, 30 N. J. Eq. 187.

company purposes, as he may be able to do so and the company desire to receive it, said advancement to bear interest from the date thereof; but a balance sheet shall be struck on the first of January in each year, or oftener if desired by three members, wherein the amount due by each deficient member shall be covered by a cash payment, or by a note to the member whose advance is in such excess, which note shall, at the desire of the holder, be indorsed by all the members.

4. If any member desires to leave the company, he shall be permitted to do so upon agreement between all the members as to the value of his interest in the company, which shall be paid him by the remaining part of the company, by note or cash, or by his payment to the company of the sum that may appear to be due from him, to equalize his part of the expenses, not theretofore borne by him, such payment to be by note or cash. Where the parties can not mutually agree as to such value or amount to be paid as above provided, such amount shall be designated by a disinterested party to be selected as arbitrators are usually chosen. No appeal from such arbitrament to be authorized.

5. A final settlement of company affairs may be demanded by the concurrent action of any three members, when the assets and debts shall be divided in a similar manner to that set forth in the preceding paragraph.

6. In case of the death of a member, his interest in the company shall not be subject to sale, but may be withdrawn at the request of his legal representatives, or of the remaining members, in the same manner as provided for the voluntary retirement of a member by the fourth paragraph.

Lease.

"This indenture, made this 5th day of June, 1862, between Henry T. Slemmer, M. D., etc., of the first part, and Jacob C. Slemmer, William Slemmer. Henry T. Slemmer, M. D., and Charles Slemmer, trading under the name and style of Slemmer Brothers,' oil refiners, of the same place, of the second part. Whereas, the parties of the second part have erected upon the premises of the party of the first part, in and through his name, works for the refining of petroleum or rock oil, the same having been done upon verbal agreement of a lease for said premises to them: Now, therefore, to

legally set forth the same, this indenture witnesseth, that the party of the first part has let, etc., unto the parties of the second part, all that certain lot or parcel of ground, situate in the borough of Norristown, lying at the southeast corner of Egypt or Main street and Ford street, being, etc., except, etc., for the term of fifteen years from April 1, 1862, at the yearly rent, etc. Reserving, however, the right to use such portions of the said premises as may not be considered requisite by the said parties of the second part for the prosecution of their business as oil refiners. * * * It is hereby mutually agreed that this lease may end at any period within the fifteen years if the parties of the second part desire it in consequence of closing their business as oil refiners. And that, at the close of the said fifteen years, or such earlier period as the parties of the second part desire to terminate it, the party of the first part shall purchase all the buildings erected or to be erected upon the premises, at such sum as both parties may agree to be equitable and just; or failing such agreement, then at such sum as may be determined upon by three disinterested arbitrators, selected in the usual manner, whose judgment shall be conclusive upon all parties."

Communication of January 25, 1866.

"NORRISTOWN, January 25, 1866.

"*Dear Brother:*—Sufficient time having elapsed since our annual meeting (and the extraordinary steps you have taken in regard thereto), for a calm and serious reflection, we deem it necessary to again bring the subject-matter before you in a decisive manner, and ask your determination in writing.

"In the first place we say to you, that under no consideration will we continue the business upon the basis heretofore carried on. The only form in which we will consent to continue the firm is, a total abrogation of all agreements heretofore made, and a new one formed, in which each member shall be equally interested in the realty, (as our previous proposal), and share equally the labors of conducting the business, or its full equivalent in salary.

"You failing to accede to this, we propose:

"To sell to you all our interests in the works, together with all the oils, machinery, etc., on hand, with credits and debits

(except the last undrawn annual dividend which we claim), for the sum of fifty thousand dollars cash upon delivery of the works.

"Should you refuse all of the foregoing, our only alternative will be to conduct the business in the future as will best promote the interests of the firm, with a view to an easy, just and equitable distribution of our property, and the dissolution of the firm and a surrender of the lease at as early a day as practicable upon your complying with its requirements.

Among other things the answer averred purchase of what was known as the Cooke lot by plaintiff; that their understanding was that this lot was to be purchased in the name of the firm; that upon remonstrating with him for having purchased in his own name, he had stated that vendors refused to make sale to the firm, which statement was false; that defendants did not know of its falsity until January, 1866. Without suspecting his designs to their prejudice, or their right to compel a conveyance, they consented to a lease by him to the firm. They denied that the partnership was dissolved, and declared their purpose that it should not be, until it could be without giving the plaintiff an undue advantage; expressed their willingness that he should retire under the terms of the articles, or continue if he would act in good faith. They charged the plaintiff with a design and continued effort by fraudulent representations to induce defendants to build on and improve the lot, and establish a business from which, when he thought it most advantageous, he might withdraw and compel a sale to himself on his own terms, etc.

C. HUNSICKER and G. R. FOX, for appellant.

R. C. MCMURTRIE and D. H. MULVANY, for appellees.

The opinion of the court was delivered May 7, 1868, by SHARSWOOD, J.

The main question which arises on this record and which has been fully discussed, both in the oral and printed arguments is, whether the articles of copartnership, dated January 5, 1861, were abrogated by the lease of June 5, 1862.

That there is any express agreement to supersede or annul them has not been and can not be pretended. It is alleged, that before the lease or the verbal agreement for it, the business of the partnership had been that of miners, not refiners. But the original articles expressly contradict this allegation. They show clearly that refining was from the first within the contemplation of the parties.

They recite "an agreement verbally entered into, in the summer of 1860, for the mining for, and disposition of, by sale or *refining*, rock oil or petroleum." A small experimental refinery was erected with the funds of the firm on Strawberry alley, in the borough of Norristown, in the summer of 1860. The lease says not a word of any new business being about to be commenced, but it is a lease from the plaintiff, Henry T. Slemmer, to the firm "Slemmer Brothers, oil refiners." Nor is there anything in the provisions of the lease, which is not perfectly consistent with the articles. There is no implied rescission. It was declared in the articles that "a final settlement of company affairs may be demanded by the concurrent action of any three members." With an evident reference to the event contemplated in this clause, the lease provides as follows:

"It is hereby mutually agreed that this lease may end at any period within fifteen years, if the parties of the second part (Slemmer Brothers) desire it, in consequence of closing their business as oil refiners."

A technical dissolution of the firm by the withdrawal of one or more partners would not, in law, if no provision had been made for the case, put an end to the lease. The term would still have been assets, to be disposed of and accounted for on a winding up, or to pass to and become the property of the continuing firm on the retirement or death of a member. It was expressly agreed, therefore, that in case of a final settlement and closing the business of the firm as oil refiners, the term should end. But it is not to expire before its efflux by time in any other event. It would be unreasonable to put a different construction upon it. The plaintiff, Henry T. Slemmer, one of the firm, is the party of the first part—the firm of which he is a member, "Slemmer Brothers," the party of the second part. By the express words of the instrument

it can only be ended before the close of the fifteen years, "if the parties of the second part desire it." Yet it is in the power of the plaintiff at any time to withdraw and thus cause a technical dissolution of the firm. He could do this independently of any agreement, subject to his liability to his copartners if the act was wrongful: *Mason* v. *Connell*, 1 Whart. 381. But here the free privilege of withdrawing at any time was secured to each partner by the terms of the original articles. It makes the argument so much the stronger on the construction of the lease. It could never have been the intention of the parties that the plaintiff, the lessor, should himself have the power of determining the lease at any time by retiring from, and thus technically dissolving the firm. Nor can there even be any inference drawn from the provisions of the lease, that the time when the partnership was to continue was fixed at fifteen years. At the end of that period the firm might wish to build a new and enlarged factory in a different place. The plaintiff, the lessor, would have been obliged then to accept a surrender, and to pay, or to be accountable to the firm for the appraised value of the buildings and improvements, and the partnership still continue to operate under its original articles. There was nothing improbable in such an event, if the friendly and fraternal relations between these brothers had continued as they ought to have done. The agreement then of January 5, 1861, is still the law of this partnership, made by the parties, its terms reasonable and just in themselves, and which a court of equity ought to regard as the rule in all questions arising between them. But it is assumed in the plaintiff's bill, and has been earnestly contended, that the letter signed by the defendants and addressed to the plaintiff, dated January 25, 1866, was a virtual dissolution of the partnership—that it closed their business as oil refiners, consequently ended the term under the lease of June 5, 1862; and that the provisions of that instrument formed thereupon the rule for winding up the concern. Such seems to have been the opinions of the master and the court below. We can not yield our assent to this as a conclusion of fact or of law. The most and the worst that can be said of the letter of January 25, 1866, is that it was a hasty and ill-advised threat. It was notice merely of the policy they proposed to

adopt with a view to a dissolution at some future time. By the terms of the original articles, any three members of the firm had clearly a right to adopt such a resolution, and it was right to give notice of it to the plaintiff a reasonable time before proceeding to carry it into effect. The plaintiff himself appears to have so regarded it. He attended a meeting of the company four days afterward, when a resolution was adopted against his voice, declaring "that the energies of the company be henceforth wholly directed to placing the company effects in a merchantable condition with a view to an early and equitable division thereof, and a final settlement of company affairs as provided in our articles setting forth an agreement, etc., dated January 5, 1861." There is nothing, therefore, in this transaction which ought to vary the relative position of the parties.

There is one other matter which requires perhaps to be noticed. It relates to what no doubt has been the source from which the unhappy differences between these brothers first sprung, the purchase by him in his own name, of the land on which the Ford street refinery was erected and the adjoining lot. The defendants allege that this was a fraud upon them, and pray that their answer may stand as a cross-bill, not for discovery, but relief, to wit, that the plaintiff may be decreed to convey to the firm. Without stopping to inquire whether this course of pleading is allowable under Rules XXXIX and XLI, in equity, as the point of practice has not been made, we think the defendants have failed to show any title to the relief for which they pray. The purchase by and in the name of the plaintiff was communicated by him to the other members of the firm at the time, and although the reason he assigned for it was probably false, and undoubtedly flimsy, yet they appear to have acquiesced. Besides which, even if the real estate purchased by the plaintiff ought to have been in the name and for the use of the firm, it is entirely too late now for the defendants to set up this claim. The acceptance of the lease and improvements made under it, the time which has elapsed, and the altered position of the parties, all preclude the idea of going back and unraveling these old transactions. Though, had the defendants shown themselves prompt, a court of equity might have decreed a conveyance,

it would clearly be inequitable to do so now. It is a maxim as good in equity as at law: *Vigilantibus non dormientibus jura subveniunt.*

It only remains to consider whether there should be a decree of dissolution and on what terms. On this subject a wide discretion is necessarily vested in a court of equity. In this State the Act of Assembly of June 16, 1836, § 13, Pamphlet L. 789, has specially conferred upon the Supreme Court and the Courts of Common Pleas, "the supervision and control of partnerships." A partnership will not be dissolved on slight grounds. The plaintiff complains that the defendants "have failed with him to conduct the business of the firm in a proper and harmonious manner." The defendants, at a meeting of the company in January 29, 1866, voted for and adopted a declaration that "irreconcilable differences exist, which preclude harmonious and successful operations by our company as oil refiners." It is lamentably plain therefore, and we might perhaps be justified in saying, admitted on both sides, that such have been the dissensions which have sprung up between these brothers, that the partnership heretofore existing between them can no longer be carried on with comfort and advantage to all concerned. In such a case a court of equity will decree a dissolution: *Bishop* v. *Breckles*, 1 Hoff. C. R. 534; Collyer on Part., § 297. In making such a decree the court will consider not merely the terms of the express contract between the partners, but also the duties and obligations implied in every partnership contract: *Smith* v. *Jeyes*, 4 Beavan, 503. Where a valuable business has grown up by the joint labors and contributions of all, the court should be careful to preserve it if possible, and to put all the parties upon a fair and equal footing in competing for it. To appoint a receiver, to direct a sale of the whole and a winding up of the business, would destroy its value without benefiting either party. The plaintiff in this bill prayed for an appraisement of all the partnership assets, and that the defendants should be directed, on the plaintiffs paying to them or securing to them the payment of the value of their respective shares in the partnership, to yield up to him the possession of the oil factory, and all the partnership estate, and that the defendants be restrained from the further management of the business of

the said factory, or of interfering or intermeddling with the same in any way or manner whatever. In other words he asked a decree, which should transfer the entire business to him. The defendants might, with much greater show of reason demand that the court should enforce the provision of the original articles against the plaintiff as a retiring partner, and require him upon an appraisement to assign all his interest to them. The court below did not make such a decree as the plaintiff asked, but on the ground that the letter of January 25, 1866, was a dissolution of the partnership and terminated the lease, they directed an appraisement of the building and improvements on the lot held under it, and the delivery of them to the plaintiff, and appointed a receiver to wind up the affairs of the concern. Practically there would not be much difference between the decree prayed for and that granted. The possession of the oil factory and its fixtures and appurtenances would be possession of the business. The duty of the receiver would only be to sell the stock of oil, material and tools on hand, and collect the outstanding debts. We deem it our right and our duty to hold the scales of justice more equally between these brothers, to give to each party the right to bid for the business and estate of the partnership, and then to award it to the highest bidder. We have made a decree accordingly.

The decree of the Court of Common Pleas of Montgomery County is reversed, and now it is ordered and decreed that on the dissolution of the said firm of Slemmer Brothers, as hereinafter declared, all the estate and assets of the partnership, including the unexpired term of the lease of the premises on which the factory is erected, and the buildings and improvements thereon, shall be assigned and transferred to that one or more of the said partners, who shall offer to pay or secure to be paid within a reasonable time the highest price for the same; and that the record of this case be remitted to the Court of Common Pleas of Montgomery County, with direction to carry this decree into effect, and for that purpose to make all necessary orders and references for the purpose of settling and adjusting the accounts between the parties, and making a final decree therein; and upon such assignment and transfer being made, in pursuance of the order of the

court, then that the said partnership shall be thenceforth dissolved. Both parties to pay their own costs in the court below, and in this court, and the costs of the subsequent proceedings to be paid from the assets of the partnership.

BABCOCK v. STEWART.

(58 Pennsylvania State, 179. Supreme Court, 1868.)

[1] **Liability of incoming partner.** An incoming partner is not liable on the contracts and engagements of the firm entered into before he became a member of it.

New partners in oil lease—Quantum meruit. A and B purchased an interest in an oil lease; shortly afterward, C and D became partners with them, and these four employed E as overseer with a joint interest; E hired F to work by the day in sinking a well. After he commenced work, three new partners came into the concern. Against these eight persons F brought suit for his wages: *Held*, that the partners who came into the concern after the contract had been made were not liable upon the contract, and that the mode in which interests in oil leases were sold, divided and subdivided, while work was going on, could not alter the rule; but that the new partners would be liable upon a *quantum meruit* for work done after they came into the firm.

Liability personal to the debtor. Those who have sold goods or done work on the credit of the original partners and have no lien, have parted with all their interest in the effects, and can look only personally to those with whom they have contracted.

The ground of liability of one partner for the acts of the others, is that of an implied general agency within the scope of the partnership.

Error to the Court of Common Pleas of Warren County.

This was an action of assumpsit brought February 22, 1867, by Daniel Stewart against W. P. Shaw, Irvine Eddy, James McGee, Henri Hall, Barber Babcock and John R. Robertson, who survived Sherman Garfield, doing business as Babcock, Hall & Co.

In the early part of 1865, Shaw and Hall purchased an interest in an oil lease; shortly afterward Eddy and McGee became jointly interested with them, and they all agreed with

[1] *Kountz* v. *Holthouse*, 85 Pa. St. 235; *Atwood* v. *Lockhart*, 4 McLean 350; *Carter* v. *Whalley*, 11 M. R. 262.

Babcock to oversee the business, he to have a joint interest in consideration of taking charge of the work. In prosecuting the work, Babcock, on the 1st of August, 1865, hired Stewart at $3 per day to work at sinking a well on the premises of the five, who were then partners. Stewart worked eighty-eight days in pursuance of his contract. After Babcock had been taken into the concern, and after the contract with Stewart, Robertson and Garfield purchased interests in the concern, and became joint owners with the other five. This suit was brought by the plaintiff against all the joint owners in the form above stated to recover his wages.

The defendants asked the court to charge:

"That if some of the joint owners sold their respective interests or portions thereof to other parties after the arrangement was made by Babcock to sink the wells, and before plaintiff commenced work on the 1st of August, 1865, there is no authority in Babcock to contract for those who purchased their interests after the contract with Babcock was made."

The court (VINCENT, A. J.,) answered: "We affirm this in part, with an explanation. Babcock could not bind one who was not a joint owner when the plaintiff began work, nor afterward; but he could bind those who came in while the work was being performed, or who had only parted with a portion of their interest before it began or during its progress. The manner in which oil interests were sold, divided and subdivided, while work was going on, would render it impossible for a creditor to collect his debt if he was compelled to begin a new account with every change of ownership made while his work was being done or his account against the company being contracted."

The verdict was for plaintiff for $296.12.

The defendants took a writ of error and assigned for error the answer to their point.

R. BROWN, for plaintiffs in error.

W. D. BROWN, for defendant in error.

SHARSWOOD, J., delivered the opinion of the court.

Nothing is better settled than that an incoming partner is

not liable on the contracts and engagements of the firm entered into before he became a member of it; Collyer on Partnership, § 520. The plaintiff in error was therefore entitled to have his second point affirmed. The court below did affirm it, but accompanied the affirmance with an explanation, which entirely destroyed its effect. They said: "Babcock could not bind one who was not a joint owner when the plaintiff began work or afterward, but he could bind those who came in while the work was being performed, or who had only parted with a portion of his interest before it began or during its progress." From what follows we may conclude that the court considered that owing to the manner in which oil interests were sold, divided and subdivided, while work was going on, a different rule was applicable to partnerships in that region. In this there was error. As was said by Lord Kenyon, in *Shirreff* v. *Wilks*, 1 East, 48, "It is hard enough for one partner in any case to be able to bind another without his knowledge or consent; but it would be carrying the liability of partners for each other's acts to a most unjust extent if we suffered a new partner to be bound in this manner for an old debt incurred by other persons." When a man purchases on interest in a firm, he can inform himself as to what are its assets and the then condition of its works. He is not bound to inquire whether all its property in possession has been paid for. Those who have sold or delivered goods, or done work on the credit of the original partners, having by law no lien, have parted with all their interest in the effects and can look only personally to those with whom they have contracted. The credit of the new member of the firm did not enter into their consideration in making the contract, and it would be manifestly unjust to hold him liable to them. The ground of liability of one partner for the acts of the others is that of an implied general agency within the scope of the partnership. The law of partnership is but a branch of the law of principal and agent. As was said by Lord Cranworth in *Cox* v. *Hickman*, 8 H. L. Cas. 268, "The real ground of liability (as a partner) is that the trade has been carried on by persons acting on his behalf (that is, of the person sought to be made liable), so that he would stand in the relation of principal toward the persons acting ostensibly as the traders, by

whom the liabilities have been incurred, and under whose managements the profits have been made." *Bullen* v. *Sharp*, L. R. 1 C. P. 86; *Feigley* v. *Sponeberger*, 5 W. & S. 564. If, therefore, any one of the defendants was not a member of the firm when the contract was made, it is evident this ground of liability does not exist. There can be no pretense or implication that the contracting part was then his agent.

Had the explanation of the court below been that for whatever work was done by the plaintiff after the new partnership had been formed, though under the old contract, the benefit of which had been received and enjoyed by the new firm, he could recover on the *quantum meruit* count in the declaration, it would have been entirely unexceptionable; but under the instruction as given to the jury in the answer, they may have included we know not how much work previously done.

Judgment reversed and venire facias de novo awarded.

KIRK v. HARTMAN & Co.

(63 Pennsylvania State, 97. Supreme Court, 1869.)

Special partners. In a suit against two as partners on contract, the question would be whether they were partners in that contract. Whether they were general partners is immaterial.

Agent—Annual hiring. A written contract by which a party is employed "to act as agent or salesman for stock," etc., of a coal company, to be paid $3,000 "in equal quarterly payments," is a hiring for a year.

Indefinite hiring. When one is employed as an agent, etc., for no definite time, it is a hiring at will of both parties, and he may be discharged without notice.

[1] **Holding out as partner.** If one holds himself out, or knowingly suffers himself to be held out, as a partner, on the faith of which others trust or enter into a contract with the firm, he is responsible, although not a partner.

Office of estoppel. Estoppels shut the mouth of a party, whether his original act or declaration was intended to deceive or not.

Evidence to vary written contract. Evidence of declarations of a party to a written contract at an indefinite time prior to it, is not admissible to introduce a new term into the contract.

Evidence of negligence of agent. Evidence that other agents in similar business at the same places did much more business than the plaintiff, is not admissible to prove his negligence or default.

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[1] *Martyn* v. *Gray*, 14 Com. B. N. S. 824.

Debt will lie on a contract for service for a determinate time and fixed compensation, when the servant is dismissed before its expiration.

[1] **Mitigation of damages.** In an action of debt upon a contract of hiring by a servant discharged before his term, his being engaged in other profitable business or refusing it if offered, may be shown by the defendant (on whom is the burden) in mitigation of damages.

Certainty, in action of debt. Debt lies on any contract in which the certainty of the sum or duty appears.

Error to the Court of Common Pleas of Allegheny County.

In the court below on the 30th of December, 1867, John Kirk brought an action of debt against S. H. Hartman and James M. Bailey, partners as S. H. Hartman & Co. The plaintiff resided in Chicago. He declared on an agreement under seal November 19, 1866, (which he set out *totidem verbis*,) by which it was agreed that he should act as agent or salesman for stock of the Pittsburg and Connellsville, Mining and Manufacturing Company, stone-coal, coke, etc., the defendants to pay his expenses when out of Chicago, and "$3,000 in equal quarterly payments." He averred that he entered upon the duties and continued to perform them till May 8, 1867, when the defendants, against his consent, discharged him; that he was at all times ready and willing to discharge his duties under the agreement; and further averred their liability to pay him three quarterly payments of $750 each, and $250 for traveling expenses. The declaration contained a general count for work and labor.

The defendants pleaded "*non est factum*, never indebted, no partnership, want of consideration, failure of consideration, rescission of contract," also, specially, that at and before the execution of the contract, the plaintiff falsely represented that he could sell the stock in a short time, and if he should fail in selling his services should not cost the company anything, and by reason thereof the defendants were induced to enter into the agreement.

The plaintiff on the trial before STOWE, J., gave in evidence the agreement as follows—the signature "S. H. Hartman & Co." being admitted to be in the handwriting of S. H. Hartman:

[1] *Saxonia M. Co.* v. *Cook*, 7 Colo. 569.

"PITTSBURG, November 19, 1866.

"Memorandum of agreement made this day between John Kirk, of Chicago, Illinois, and S. H. Hartman & Co., of the city of Pittsburg, witnesseth as follows: The said Kirk agrees to act as agent or salesman for stock of the Pittsburg and Connellsville Mining and Manufacturing Company, stone-coal and coke, and to travel, if said company should desire it, not to exceed four months in the year, and when out of Chicago the party of the second part to pay all traveling expenses, but when at home, in Chicago, to board himself; and for Kirk's services we agree to pay him three thousand dollars in equal quarterly payments, and to allow Kirk the privilege of taking orders for other parties for goods, not interfering with the interest of the said S. H. Hartman & Co.

"In witness whereof we have hereunto interchangeably set our hands and seals.

"JOHN KIRK. [SEAL.]
"S. H. HARTMAN & Co. [SEAL.]"

Also, the following letters, under objection and exception:

"SHERMAN HOUSE, CHICAGO,
"September 27, 1866.

"John Kirk, Esq. Dear Sir:—Mr. Hartman and I called this A. M. on Hall, Kimbach & Co., to whom we had letters, and they very kindly consented to permit us to refer any of your citizens to them.

"Below you will find the names of some of our subscribers who reside in our city.

"W. E. Schmertz, etc.

"There are others, but they are probably not so well known or so easily referred to as the above. There is already subscribed in our city over $225,000. We leave with your son a subscription book, which you can use when obtaining subscriptions. We intend organizing the company the coming month, at which time the first installment will be called in and the balance will be called for as fast as it is required to be expended in the erection of the works. When we called on Mr. Hall we found him too unwell to talk over the matter, but Mr.

Hartman thinks that you will be able to sell H., K. & Co. some $40,000 or $50,000 of the stock.

"Hoping to hear from you soon,

"I remain very truly yours,

"JAMES M. BAILEY."

"PITTSBURG, January 12, 1867.

"Mr. John Kirk:—Inclosed you will please find all the copies yet ready of the charter, and statement of P. & C. M. & M. Co. The statement may not be such as you wished for, and if not, please state what alterations or additions may be necessary. Our Mr. H. thought, from examining the one of Mr. Moore's that you inclosed him, that the present one might answer. * * We will give the order for coal our best efforts, as far as fit, as well as quality is concerned. I think there is no doubt of its answering fully.

"We hope that you may succeed in inducing others to make the trial. Our steel company is in a flourishing condition; think will be able to organize next week. Send word where to send you the balance of the printed copies of charter and statement. Mr. H. says he hopes that you will keep stirring up the monkeys.

"Yours respectfully,

"S. H. HARTMAN & Co., by Bailey."

"PITTSBURG, March 16, 1867.

"John Kirk, Esq. Dear Sir:—Your friend Mr. Bogle called on Mr. Bailey before I returned, and made arrangements to go to Connellsville with some of us. Yesterday he called on me, stating that he had difficulty in getting cars to ship his coal in, therefore he would have to put it off till next week. If he can spare the time to spend a few days in the coal region I hope he will remain long enough to see what we have in that rich country. I am much pleased with him. Be good enough to let me know what he is worth (and how he stands as a merchant).

"Yours truly,

"S. H. HARTMAN."

"No. 70 ST. JOHNS PLACE, CHICAGO,

"March 25, 1867.

"Messrs. S. H. Hartman & Co. Gentlemen:—I am in receipt of your favor of the 21st inst. * * * I expect to

leave in the morning for Milwaukee, and on my return leave for Saint Louis, stopping on my way thither at Joliet, etc. Whichever route do you think will be most advisable to take first? I do not intend to stop until I go every place you think it advisable to go to.

"I am obliged to you for any suggestions you may make in the way of inducing merchants to subscribe. But the one you mention in your note of the 21st, I have repeatedly made.

"I think it would be well for you to send me a complete list of all your stockholders, and the amount of stock subscribed by each, as it might be more satisfactory. Mr. Bailey wrote me that you had been very successful in getting stock taken lately. * * *

"Very respectfully, your friend,

"JOHN KIRK."

"PITTSBURG, March 26, 1867.

"Friend Kirk. Dear Sir:—Your favor of the 25th inst., is received.

"I think you would do well to confine yourself to the large places, Chicago, Quincy, St. Louis, Alton, and not have more than one or two subscribers in each town, from twenty to thirty thousand dollars. I can see no objections to your selling coal and coke. Mr. Bailey has the subscription, and when he comes home I will call attention to it.

"Very respectfully,

"S. H. HARTMAN."

"PITTSBURG, PA., April 9, 1867.

"John Kirk, Esq. Dear Sir:—Yours of the 2d inst. has been received. We will reply to Mr. Ridgeley's request as soon as we can arrange rates with the R. R. Co. After carefully considering the closing part of your letter, and taking the general tenor of your former ones, we have concluded that for *the present* you had better discontinue any further efforts to obtain subscriptions to the stock of the P. & C. M. & M. Co. Your entire want of success has convinced us that your remarks 'that no human agency could convince the people of the real merits of the undertaking,' is perfectly correct. We would, therefore, with your consent, prefer to close the contract with you for the present, and wait for a more favor-

able time for you to operate upon the feelings of the citizens of the West. Feeling certain that from your well known abilities y u could readily command a better salary from other parties, we feel satisfied that such a course would occasion you no inconvenience, and would rather be a relief from an unpleasant duty than otherwise. If this course meets with your approval you will please send a detailed statement of your account, so that we can close it.

"Yours respectfully,

"S. H. HARTMAN & Co.

(The foregoing is in the handwriting of Bailey.)

"No. 70 ST. JOHNS PLACE, CHICAGO, April 15, 1867.

"Messrs. S. H. Hartman & Co. Gentlemen:—* * * On reaching home I received Mr. Bailey's letter of the 9th inst., the reading of which amused me a good deal. Mr. B. writes a good letter, but he compliments me too highly. I am very sorry that I can not consistently annul our contract until the year expires. You will recollect that I did not want to engage with you until you got your mill into operation, and had it not been for the promise of giving the Western agency to me when the mill started, I should not have hired with you at all. But still, if I could get another situation equally as good I should have no objections to accommodating you, but I do not like to run any risks. * * I have no idea of leaving you, unless I can better myself (with your consent) to work for another firm, until my year expires. * *

"Again, I understand that you were to open a coal and coke yard here in Chicago, that I was to attend to; but if you have concluded not to do so, if you can sublet me to some other Pittsburg coal firm I will sell coal for them, but will hold on to you for my quarterly salary. Another thing, I have a house rented that I will have to pay a year's rent for, unless I can rent it when my time expires with you.

"I am aware that the way things look now, business being so extremely dull in all departments, I have no idea that I could get anything to do. But still I will look round and see if anything can be done, and if a favorable opening offers I will write you.

"Very respectfully, your friend, JOHN KIRK."

"No. 70 ST. JOHNS PLACE, CHICAGO, April 29, 1867.

"Messrs. S. H. Hartman & Co. Gentlemen:—* * I regret that there should be any misunderstanding between us in relation to our contract, for it seems to me to be so plain (to use the language of one of the ancient prophets), that 'the wayfaring men, though fools, shall not err therein.' I have nothing to add to the closing part of my letter to you of the 15th inst.

"I then stated to you that you might sublet me to some other coal company. Perhaps you might make a satisfactory arrangement for me to do something for the Jones & Nimick Mfg. Co. to sell their goods, or with Lorenz & Wightman, to sell their glass.

"I have been looking round through the city here for something to do, but have not succeeded. One of the coal-yard owners said if business revived he might, perhaps, have something for me to do. Very truly your friend,

"JOHN KIRK."

"PITTSBURG, May 8, 1867.

"John Kirk, Esq. Dear Sir:—Yours of April 29th was received. We regret very much that you still persist in treating the matter of our contract in the manner you do. *All* contracts are liable to different explanations and constructions, and we feel perfectly able to sustain our position, even (to use your language) to 'wayfaring men, though fools.' Now we feel that the position you have taken is one that will neither bring profit to you, nor honor to any one who desires a reputation for honesty or fair dealing. We propose to close your engagement with us simply because you have done us no service, and state in your letters that you *can not* do us any. If you have not already understood from our former letters that we did not wish you to attend to any business for us, we wish to state now that such is our desire, and we hope that you will make a note of it, so as to save you any further trouble or expense on our account. We wish to settle our matters in a spirit of fairness and justice, and if you feel inclined the same way, we don't think there should be any trouble between us. If you desire us to try to make any arrangements with other parties to employ you, will do so with pleasure any time.

"Yours respectfully, S. H. HARTMAN & Co.

Per B."

(The foregoing letter is in the handwriting of Bailey.)

There were many other letters read, which it is not necessary to insert, all being admitted under objection and exception.

The plaintiff gave in evidence also his account for traveling expenses, on which there appear to be due him a balance of $21.09.

He gave evidence of services under the contract.

The plaintiff having closed, the defendants offered to prove, by D. R. Davidson, conversations between the plaintiff and Hartman during the progress of the negotiation to show misrepresentations by the plaintiff which led to the contract being made, etc. The offer was admitted against the plaintiff's objection, and the witness testified: "Kirk said, 'I can sell all your stock without any trouble, but you must pay me well.' This conversation was in November, but I can not tell the time; they were talking about making the contract; they were talking about it all the time I was with them, a portion of two days; it was before the middle of November." Defendants then offered to prove that "in connection with the statement of plaintiff, that he could 'sell all your stock easily,' the plaintiff stated that if he should fail in selling the stock it should not cost the company anything."

The offer was objected to by the plaintiff, rejected by the court, and a bill of exceptions sealed.

The defendants offered to prove that during the period of service between November 26, 1866, and May 8, 1867, a large trade was carried on, through agents, in stone-coal and coke, between Pittsburg, Springfield, etc., and other places in the West, which the plaintiff visited during that period, and charged expenses to the defendants therefor, to be followed by evidence that plaintiff sent orders during the whole period named for but six or eight car-loads of coke, being a very small amount compared with the actual sales effected through agents at those points; for the purpose of showing negligence and default on the part of the plaintiff, under his contract, and justifying his discharge. The offer was objected to, rejected, and a bill of exceptions sealed.

The plaintiff submitted this point:

"If Mr. Bailey induced plaintiff to believe that he was the

partner of Hartman in this transaction, before the contract was made, he is now estopped from denying the partnership." The court answered:

"This we affirm, if you should find the facts to be so."

"1. The plaintiff having failed to prove a partnership, as averred, between defendants, can not recover in this action.

"2. Under the pleadings and evidence in this cause, the plaintiff can not recover.

"3. It appearing from the evidence that the signature and seal to said agreement of the name 'S. H. Hartman & Co.,' is in the handwriting of S. H. Hartman, one of the defendants, and the plaintiff not having proven that the same was executed in the presence of James M. Bailey, the other defendant, or that the said Bailey has subsequently ratified or accepted the same, the plaintiff can not recover in this action.

"6. The evidence offered by the plaintiff to prove partnership between these defendants can not be used in argument, or be considered by the jury to establish a ratification or adoption of the sealed instrument, by the defendants not signing it.

"7. The contract offered in evidence is not for any definite period of time, and the principals had the right to terminate it at any time, and to discharge the plaintiff from their service, without notice.

"8. The sale of stock was a material part of the contract, and if plaintiff wrote to defendants that he had utterly failed to sell any of said stock, then such failure would warrant the defendants in discharging the plaintiff.

"9. If the jury believed that the hiring was for an indefinite period of time, their verdict must be for the defendants."

The court denied the foregoing points from the 1st to the 8th inclusive, and in answer to the 9th said:

"This is a matter for the court, and we instruct you as a matter of law that the contract was binding upon the parties for one year."

The jury found for the plaintiff $2,430.87.

The defendants took out a writ of error. Their specifications of error were:

1–7. The answers to their points.

8. The answer to the plaintiff's point.

9. "Admitting the letters offered by plaintiff below."
10, 11. Overruling the defendants' offers of evidence.

S. SCHOYER and J. H. BAILEY, for plaintiffs in error.

M. W. ACHESON, for defendant in error.

The opinion of the court was delivered by SHARSWOOD, J.

Whether the defendants below, Hartman and Bailey, were general partners in any kind of business did not appear, nor was it material. It would be sufficient to show that they were jointly concerned in the particular transaction in which the plaintiff, Kirk, was employed as agent or salesman. That was to form a company, to be called The Pittsburg and Connellsville Mining and Manufacturing Company, and to dispose of its stock, as well as to sell stone-coal and coke. That Bailey was a party to this scheme with Hartman can scarcely be questioned. His letter, dated September 27, 1866, alone is very persuasive evidence of it. He speaks of Mr. Hartman and himself having called on certain persons and obtained their consent "to permit us to refer any of your citizens to them." "We intend," he proceeds, "organizing the company the coming month, at which time the first installment will be called in, and the balance will be called for as fast as it is required to be expended in the erection of the works." It is to be noted that this letter is signed James M. Bailey, not S. H. Hartman & Co., per Bailey, as some of the other letters are, from which the inference is attempted to be drawn that *non constat* that he was not a mere clerk. So the letter of February 12, 1867, signed James M. Bailey, says: "Mr. S. H. H. has gone to Ky., to attend to some of our coal interests in that State." In all the correspondence, as far as it was conducted by him, he speaks the language of a principal; and the letters of April 9, and May 8, 1867, by which the plaintiff was dismissed from their employment, show plainly that he knew and had ratified the contract sued upon, which had been executed under seal by his associate Hartman. This disposes of the 1st, 3d and 4th assignments of error.

Nor is it less clear that no error was committed by the

learned judge in instructing the jury that the contract sued upon was binding upon the parties for one year. When, indeed, a person is employed as an agent, traveler or salesman, for no definite time, the law does not imply a hiring by the year, but at the will of both parties, and the principal has a right to terminate it at any time, and to discharge the agent from his service without notice: *Coffin* v. *Landis*, 10 Wright, 426. "No doubt," as it is said in that case, "there is a class of contracts for the employment of servants where the law presumes the contract to intend a yearly or monthly employment, though nothing is said of the durati n of service. They are more numerous in England than in this country. They relate to contracts of hire of menial domestic and husbandry servants." That was an employment to sell land, as this was to sell stock. But the written agreement in this case by fair intendment or construction of its language, is for one year, although it does not expressly so provide.

"For Kirk's services we agree to pay him three thousand dollars in equal quarterly payments." According to the lexicographers, "quarterly" is the same as "quarter-yearly," and means "once in a quarter of the year." Such, too, is the received popular sense of it, which we are bound to notice and regard. He was to be paid a fixed sum, and if it was for no fixed time, as, for example, for his entire services when all the stock was sold, how could it possibly be made in quarterly payments, even supposing that word to signify simply a division into four parts? This disposes of the 5th and 7th assignments.

The 8th error assigned is to the instruction "that if Mr. Bailey induced plaintiff to believe that he was the partner of Hartman in this transaction, he is now estopped from denying the partnership." Nothing certainly is more firmly established than that if a man holds himself out, or knowingly suffers himself to be held out as a partner, on the faith of which others trust or enter into contracts with the firm, he is responsible whether he is in point of fact interested as a partner or not: Collyer on Partnership, § 86. It is not important for what reason the rule was established. It was, says Mr. Collyer, "upon principles of general policy to prevent the frauds to which creditors would be liable if they were to sup-

pose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing." It may, however, very well stand upon the ground of estoppel. All estoppels shut the mouth of the party, because it would be a fraud in him to speak, whether his original act or declaration was intended to deceive or not.

The 9th error is not properly assigned according to Rule VIII, 6 Harris, 578, and we must treat it as none.

The 10th assignment is to the rejection of the offer to prove that in connection with the statement of plaintiff that he could "sell all your stock easily," the plaintiff stated that if he should fail in selling the stock it should not cost the company anything. It was not proposed to show that this was said at the time the contract was made, and that upon the faith of such assurance it was executed, as in *Bollinger* v. *Eckert*, 16 S. & R. 422, *Rearich* v. *Swinehart*, 1 Jones 233, and other cases of that class. It was a bald offer to introduce a new term into a written contract by parol evidence of a verbal declaration at some undefined time, without a pretense of fraud or mistake in the drawing of the contract. Of course the evidence was rightly rejected.

The 11th assignment is that the court below erred in overruling an offer to prove in substance that in comparison with other agents employed to sell stone-coal and coke in different Western towns, the plaintiff had effected but few sales; this for the purpose of showing negligence and default on the part of the plaintiff under his contract, and justifying his discharge.

But it would be a very severe rule to apply, and justified by no principle of law, that comparative want of success in making sales by a traveler or salesman shall be evidence itself of negligence and misconduct. Yet upon that must the offer stand. It would have introduced a very extensive and embarrassing investigation as to the sales made by other agents, and would have been totally irrelevant to any question in issue in the cause.

This disposes of all the assignments of error except the 2d —that under the pleadings and evidence in this case, the plaintiff can not recover. "If any specification embrace more

than one point, or refer to more than one bill of exceptions, or raise more than one distinct question, it shall be considered a waiver of all the errors as alleged." Rule VI, 6 Harris, 578. It would seem, however, by the oral and printed arguments of the counsel for the plantiffs, that the question intended to be raised by this assignment is whether, where there is a contract of service for a definite period, and the servant is dismissed without cause before the expiration of the time, he can maintain debt for the stipulated wages or salary after the term has ended. That question must be considered as now settled in *King* v. *Steiren*, 8 Wright, 99. It was there held that an employe for a determinate period, if improperly dismissed before the term of service has expired, is *prima facie* entitled to recover the stipulated compensation for the whole time; and that if he was engaged in other profitable employment during the term, or such employment was offered to him and refused, the defendant, upon whom is the burden of proof, may show it in mitigation of damages. However it might be on a general count for work and labor done, the declaration here was special on the agreement, averring the discharge and the plaintiff's constant readiness to perform the agreement on his part. Now debt lies upon any contract in which the certainty of the sum or duty appears: Buller's Nisi Prius, 167. If, as we have seen, the plaintiff *prima facie* was entitled to recover the whole amount of the stipulated compensation, it answers all the conditions of the form of action, and can not be affected by the fact that it is open to be reduced by evidence on the part of the defendant.

Judgment affirmed.

HEDGE AND HORN'S APPEAL.

(63 Pennsylvania State, 273. Supreme Court, 1869.)

Irregular proceedings in equity, when disregarded. In proceedings in equity, for account, etc.. there was an answer denying the allegations of the bill, but no replication; the court without finding a partnership, or decreeing an account, referred the case to a master, who heard testimony, found facts and reported an account: *Held*, to be irregular, but no exception being taken in the court below, the Supreme Court would disregard the irregularity.

[1] **Joint stock company.** A joint stock company is a partnership, the capital of which is divided, or agreed to be divided, into shares, so as to be transferable without express consent of all the copartners.

Evidence of the partnership relation. An application for shares and a payment of the first deposit in a joint stock oil company does not constitute one a partner, where he has not interfered with the concern; nor is the insertion of his name by the secretary in a book of the company, containing a list of the members, a holding of him out to the public as a partner; but if he act as a member or director, attend meetings, or otherwise give himself out as a member, he will make himself liable, though there may be some want of the necessary formalities or acts to make him legally a member.

[2] **Subscription to stock does not create partnership.** A partnership is founded in a voluntary contract of the parties, as distinguished from a mere community of interest. A subscription to shares is but a declaration of the intention to become a partner, and is executory only. If the subscriber never takes any further part in the organization of the company, and never acts with it, he is not a partner.

The meeting of some of the subscribers to organize their company and enter into the actual relation of members to it, binds none but those who meet.

Appeal from the decree of the Court of Common Pleas of Washington County.

On the 12th of June, 1867, Morgan W. Zollars filed a bill against Shadrach Hedge, Christopher Horn, Caleb H. Zollars, A. H. Deaves and thirty-nine others. The bill alleged:

1. That about April, 1865, the plaintiff and defendants formed a voluntary association, called The Keystone Oil Company, to procure land and bore for oil.

2. That the company was composed of 80 shares, the plaintiff owning four shares, C. H. Zollars four shares, Horn and Hedge two shares each, and the remaining shares were held by the other defendants in proportions set out in the bill.

3. That there was to be paid $125 for each share, that thirteen of the defendants have paid the full amount for their shares, and that if the others would so pay there would be sufficient assets to discharge the liabilities of the company.

4. That the company secured a lease of land, purchased machinery and sunk a well, but failed to obtain oil, and since November, 1866, have done nothing further.

[1] *Bullard* v. *Kinney*, 11 M. R. 348.
[2] *In re Great Cambrian Co.*, 2 K. & J. 253.

5. That the company owes the plaintiff $827.50, and other persons about $1,066.70.

The prayers were for discovery of the amounts paid by each member; of the disbursements of the funds and of the liabilities of the company; for a receiver; for a settlement of accounts between the members and payments of the sums adjudged against them respectively and for further relief.

C. H. Zollars admitted that he subscribed for four shares, but that by consent of the directors and at his request his subscription was reduced to two shares.

Hedge and Horn answered jointly:

1. That on the application of Deaves they subscribed for two shares in a company to be formed, but never took any further part in the company, were never informed of any meeting, etc.

2. They denied that they had any shares in The Keystone Oil Company, and averred that they never received any evidence that they were regarded as members of it.

3. They averred that the value of the shares for which they subscribed was $50 each.

4 and 5. They were not informed as to the allegations in these paragraphs.

All the other defendants made default, and the bill as to them was taken as confessed.

No replication was filed to the answer of Hedge and Horn.

The court did not find a partnership nor decree an account. Alexander Wilson, Esq., was appointed master; he heard a large amount of testimony on the questions raised by the bill and answer.

The master, in his report, stated the evidence very much at large, and reported that Hedge and Horn had each subscribed for two shares of the stock and that neither had paid any part of their subscription. He further reported: * * *

"There is no testimony that Hedge and Horn ever did participate in any meeting of the company, but the evidence is plenary that the company was formed; and that a formal organization took place shortly afterward by the election of a president, vice president, secretary, treasurer and board of directors. This was done by the stockholders, as the minutes show, on the 28th day of April, 1865.

"Although the want of this formal organization would not relieve the respondents from liability, it shows that prompt 'steps were taken' by the members to carry out the objects of the association. And the evidence is also plenary that 'liabilities were incurred' by the company—undoubtedly incurred on the faith of the subscription of stock. Had Hedge and Horn desired to withdraw from the company, it was their duty to do so promptly before any liabilities had been incurred, or any steps taken toward the prosecution of the work. Hedge and Horn subscribed to the stock, told divers persons that they had taken stock, suffered the company to go on with the work and incur large indebtedness, and they can not now be permitted to set up the defense that they never received formal notice of meetings, or participated in the formal action of the company. The consideration for their subscriptions was the prospective gains of the association in the venture for oil, and the law does not recognize the doctrine of Hedge that if oil was obtained, he would pay; otherwise he would not." * * *

"So soon as a subscription paper, such as this was, becomes complete by the subscription of the stipulated amount of money, the subscribers become an association, united for contributing to a common fund for a common purpose; the subscription of each becomes a contract by each with his fellows, in consideration of similar contracts by them, to contribute to the common fund the amount subscribed by him. But this subscription may be withdrawn before the actual organization and before any liabilities have been incurred on the faith of the subscription." * * *

The master reported an account finding amongst other things that Hedge and Horn owed $250 each; also what was due from each stockholder, the names of the creditors and the amount due to each, the claim of the plaintiff, $507.71, being one.

The report of the master was excepted to and confirmed by the court, who decreed that Hedge and Horn should each pay $250; that the other stockholders pay what was ascertained by the report to be due by them; that the plaintiff and the other creditors be paid their respective claims, etc.

Hedge and Horn appealed and assigned for error: Referring the case to a master without first decreeing an account;

decreeing the payment by Hedge and Horn of $250 each, and confirming the master's report.

D. T. WATSON, for appellants.

D. S WILSON, for appellee.

The opinion of the court was delivered by AGNEW, J.

This is a bill in equity, setting forth a partnership, or voluntary association, actually formed, for the purpose of procuring land and boring for oil. The plaintiff, as a partner or member of the association, claims an account, and payment by the delinquent members of the sums alleged to be owing to the company. The principal question raised is, therefore, whether the defendants who appealed were members of the partnership; otherwise they are not liable to account under this bill. It is not an action by the association against a subscriber for his subscription. If the appellants never became partners, the bill ought to have been dismissed, as to them. The appellants, while admitting that they signed a subscription paper (then being carried around for the purpose of forming a company), for two shares, of $50 each, and not at $125 a share, totally deny their membership as partners, averring that, after writing their names on the subscription paper, they never took any part in the formation of the company, were not informed of any meeting to organize, and never acted with the company as members thereof. This answer was not denied, by replication or otherwise, and the case went to a master, who seems to have acted also in the capacity of examiner, in taking the testimony. The court did not find the fact of partnership, or decree an account, but the whole thing seems to have come up on the report of the master, upon the testimony had before him. This was very irregular, but it is unnecessary to decide the case on this ground. Indeed, after a hearing on the merits, without exception in the court below, to the formal defects, as was the case here, we might disregard the irregularity, under the law regulating appeals to this court in equity cases. The Act of 21 April, 1846, Purd. 406, pl. 41, declares that appeals in

equity from the Common Pleas shall be "in the same manner and upon the same terms as appeals are allowed from the Orphans' Court." By the Act of 14th July, 1857, Purd. 402, pl. 11, conferring on the several courts of common pleas the additional equity powers' vested in the Court of Common Pleas and District Court of Philadelphia, the appeal is directed to be upon the same terms and conditions as provided for appeals from those courts. The appeal from the Common Pleas of Philadelphia is directed to be upon the same terms and with the same regulations provided for appeals from the Orphans' Court: Purd. 405, pl. 35. Upon decrees from the Orphans' Court, the Act of 14th April, 1835, provides that the Supreme Court shall "hear and determine the same, as to right and justice may belong, and refer the same to auditors, when, in their discretion, they may think proper;" and the Act of 16th June, 1836, directs the Supreme Court, on appeals from the Orphans' Court, "to hear, try and determine the merits of such cases, and to decree according to the justice and equity thereof:" Purd. 769, pl. 50, 51. This brings us at once to the master's report. The master finds, as to these appellants, and it is the utmost the facts reported can prove, that each of them "subscribed for two shares of stock, in the 'Keystone Oil Company,' of the value of $125 each, and that he has not paid any portion thereof." The master, after stating the denial in the appellants' answer, to wit, that they never took part in the formation of the company, and never acted as members of it, finds, as a fact, that there is no testimony that they ever did participate in any meeting of the company, but the evidence is plenary that the company was formed, and that a formal organization took place on the 28th of April, 1865. In no part of his report does he state as a fact, or any fact indicating that the appellants became members of the company, or did acts of participation. From the subscription for shares alone, and the fact that appellants gave no notice that they withdrew from the association, the master draws his conclusion that they were partners, or members, and reports against them for the non-payment of their subscriptions.

The whole case is narrowed down, therefore, to the question, whether a subscription to shares of an unincorporated joint

stock association, without more, constitutes the subscriber a member of the association, or partner liable to all the duties and responsibilities of a member. Upon this question we differ from the master, and court below, upon principle and authority. A joint stock company, such as this is, differs, in some respects, from an ordinary partnership. It is defined to be a "partnership whereof the capital is divided, or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners." This definition, taken from the statute of 8 and 9 Vict. c. 110, is said by Mr. Parsons, in his work on Contracts, c. 11, p. 144, to be applicable to such companies in this country. He further states, as the result of the authorities, upon the effect of becoming a subscriber to an intended company, as regards the creation of a partnership between the members, that an application for shares, and payment of the first deposit, did not suffice to constitute one a partner, where he had not interfered in the concern; and that the insertion of his name by the secretary of the company in a book containing a list of the members, was not holding himself out to the public as a partner; and this, on the ground that such person does not thereby acquire a right to share in the profits. So on the other hand, if the subscriber interpose and act as a member, or director, or attend meetings, or accept office, or otherwise give himself out as a member, he will make himself liable, even though there be some want of the necessary formalities, or acts of a party to make him legally a member: 1 Parsons on Contracts, 145.

Mr. Collyer, in his work on Partnership, p. 626, says, as to what constitutes an actual partner in a joint stock company, that in this, more than in any other kind of partnership, a variety of acts are done before the partnership is actually commenced; notices are published, prospectuses are distributed, meetings held, officers chosen, deposits paid, scrip receipts given, long before the business is commenced, or the deed of settlement is executed. Many acts are necessarily done before the full number of intended shareholders are made up. Hence the mere subscription for stock, and payment of a deposit, and the doing of acts which merely exhibit an intention to become members, do not alone constitute them part-

ners. Thus far, the contract is merely executory, and it becomes executed and the relation is established only when they evidence the fact by acts of participation. This, it seems to me, is founded upon good reason, and can stand well in principle. A partnership is founded in the voluntary contract of the parties, as distinguished from a mere community of interest, which by operation of law may arise in various ways; and hence, says Mr. Story, in his work on Partnership, § 5, it is an established principle of the common law, that a partnership can commence only by the voluntary contract of the parties. Now, what is a subscription to shares for the purpose of forming a joint association, to prosecute any work or matter of business? When the first subscriber signs his name, he is unquestionably not a partner, for there is no other on the paper; when the second subscribes, the partnership is not formed, for it is expected that others will subscribe. When the whole number of shares contemplated have been subscribed the relation of partnership still is not formed, for until the subscribers enter upon their project nothing is done to effectuate their common purpose. The subscription is but an act, or declaration of the intention of the subscriber to become a partner, and is executory only. The thing itself yet remains to be done. Now, the meeting of some, or of many of the subscribers, to organize their company, and enter into the actual relation of members to it, binds none but those that meet. They can speak only for themselves, for not yet being partners, they can not exercise their power of partners, to bind others as partners.

It is just at this point the error of the master begins. Because other subscribers met and formed a company, he draws the conclusion that all the subscribers not expressly dissenting, were bound. But this was not so, for the subscribers who met were not yet partners, and could not therefore bind those who did not meet. It needed the voluntary consent of the absent subscribers to the contract of partnership, to make them partners. This they never gave, by word or deed, and consequently they never became partners. If these views need any confirmation from our own authorities, they will be found in the following cases, where though the very point is not ruled, its underlying principle is: *Phipps* v. *Jones*, 8

Harris, 260; *Pittsburgh & Con. R. R.* v. *Graham*, 12 Casey, 77; *Strasburg Railroad* v. *Echternacht*, 9 Harris, 220; *Rice* v. *Shuman*, 7 Wright, 37; *Edinboro Academy* v. *Robinson*, 1 Wright, 210.

Upon the whole case, we are of opinion that no partnership relation existed between the appellants and the other subscribers, and therefore that the bill must be dismissed as to the appellants, but without any prejudice to the right at law of the company to sue for and recover, upon the contract of subscription of the appellants, if any such right exists.

Bill dismissed without prejudice, and at the costs of the plaintiff in the bill.

BRUNDAGE v. ADAMS ET AL.

(41 California, 619. Supreme Court, 1871.)

Service of statement to support new trial, unnecessary. The fact that a statement in support of a motion for new trial has not been served upon the opposite party is not a ground for denying the motion. No such service is required either by statute or rule of court.

Notice of motion for new trial waived. A failure to give notice of intention to move for a new trial, although the motion has been duly filed, will not warrant the denial of the motion if the successful party failed to reserve his right to make this objection at the time he proposed amendments to the statement.

Assessments of mining interests. The statute of 1865–6, in relation to levying assessments against the owners of interests in mining claims for the purpose of working the same, applies only to copartners in the claim, and has no reference to those who are mere owners and shareholders, without the partnership relation.

Idem. To warrant such assessment, if the partnership relation does not exist, the joint owner must be notified that thenceforward he will be deemed a copartner for the purpose of working the claim, and the service of the notice changes the relationship of the parties, and creates a mining partnership.

Constitutionality of Cal. partnership act. The question of the constitutionality of the act providing for forced sale of partnership interests without contract or judicial process, suggested by the court but not considered.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

The court below rendered judgment in favor of the plaintiff. The defendants appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion.

WHITING & NAPHTALY, for appellant.

QUINT & HARDY, for respondent.

By the Court, WALLACE, J.

The court below should not have denied the motion of the defendants for a new trial because they had not served their statement in support of the motion. They had filed it within the time provided in the stipulation of June twenty-third. Neither the stipulation, nor the statute, nor any rule of the court below which has been called to our attention, required them to serve it. (Sec. 195.)

The point is now, however, made in argument here, that the motion for new trial was correctly denied, because the defendants, though they filed, did not serve their notice of intention to move for a new trial. But the answer is, that the plaintiff did not make this objection, nor reserve his right to make it, when he proposed his amendments to the statement. Had he done so, the fact of service might possibly have been shown, or a waiver of it in some way made to appear.

The action is brought to quiet the alleged title of the plaintiff to certain mining ground, being an undivided interest in the Delphi mining claim, in Kern county. The answer denies the plaintiff's title. On the trial the plaintiff undertook to show that he had acquired the interest and estate formerly owned by the defendants in the mine. For this purpose he offered and read in evidence, against the objections of the defendants, a conveyance made by Ross, the sheriff of Kern county, running to the plaintiff as grantee, and purporting to convey to the latter the estate of the defendant Adams in the premises.

This conveyance in substance recites, that in the Clear Creek Mining District, in Kern county, an assessment was levied

against the owners and shareholders of the Delphi claim, for the purpose of defraying the expenses of prospecting and working it; that Adams, owner of an undivided interest, neglected and refused to pay, after notice given; that thereupon his interest in the claim was advertised for ten days, and was sold by the sheriff to the plaintiff, pursuant to the provision of "An act concerning partnerships for mining purposes," etc. The plaintiff also read in evidence, against the objections of the defendants, a conveyance to himself, made by the sheriff, and purporting to convey to the plaintiff the interest of Devlin, the other defendant in the mining claim, and reciting, *mutatis mutandis*, the same matter recited in the Adams deed, already mentioned.

The objections taken by the defendants to the introduction of these deeds were numerous, and among the rest was the objection that there was no authority of law shown in the sheriff to convey the property of the defendants to the plaintiff, and that the conveyances do not sufficiently set forth a compliance with the requirements of the act of the legislature to which they refer. The argument upon either side has proceeded here upon the assumed constitutionality of the statute itself, through the provisions of which the plaintiff claims to have acquired the title of the defendants; and we shall, therefore, determine the case without reference to that question.

It will be seen that the statute, 1865–6, p. 828, in the first section, distinctly designates the persons who "shall be subject to the provisions and liabilities imposed by the act." Such persons must be copartners—"copartners for the purpose of prospecting or working said mining claim," in the language of the statute. It is not enough that they are "owners and shareholders," as these deeds recite that Adams and Devlin were, or that they are associated together for the purpose of working or prospecting a mining claim on the public lands. So long as these and no other relations exist between the parties, their interest in the mining claim is not subject to be divested by such proceedings as those here relied upon. Notice must first be given to such occupant, locator, or person associated, that he will be thenceforward deemed and held to be a copartner "for the purpose of prospecting or working said mining claim." Such a notice given to those who are

owners, or shareholders, or locators, or occupants, etc., by one who is jointly concerned with them in the enterprise, would have the effect, under the provisions of the statute, to change the relations of the parties *inter sese*, and create a mining copartnership between them; and only after that had been effected, a notice or notices looking to the levying of an assessment, etc., under section two of the act, etc., may be served, and other proceedings taken, according to the further provisions of the statute. There is no authority whatever to proceed as here attempted under the statute, unless the mining copartnership be first created between the parties; and there being no evidence tending to show that fact, the court below should have excluded the conveyance offered by the plaintiff.

Judgment and order denying new trial reversed and cause remanded.

CROCKETT, J., being disqualified, took no part in this decision.

JONES v. CLARK ET AL.

(42 California, 180. Supreme Court, 1871.)

[1] **Power of superintendent to bind partnership.** A superintendent of a mining partnership has no authority, as superintendent, to purchase ditch property for the purpose of supplying the company with water to work their claims, or to give the company's note in payment. There must have been special authority for that purpose, or his acts must have been afterward ratified, otherwise the partnership will not be bound.

[2] **Acts of superintendent afterward ratified—Estoppel.** A promissory note given by the superintendent of a mining partnership, in payment for property purchased by him in the name of the company and for its use, will be held to be ratified by the company, although not authorized at a company meeting, if the partnership afterward uses the property so purchased and acquiesces in the payment by the company of the interest upon the note, until after the debt would be barred, if the note were held invalid. By such conduct the company is estopped from disputing the validity of the note.

Parties—Retired partner. In a suit to dissolve a partnership and for an accounting, and to have a note held by the plaintiff paid out of the part-

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[1] *Withington* v. *Herring*, 5 Bing. 442; *Ricketts* v. *Bennett*, 11 M. R. 278; *Brown* v. *Kidger*, Id. 343; *Decker* v. *Howell*, Id. 492; *Manville* v. *Parks*, 7 Colo. 128; *Post* v. *Pearson*, 108 U. S. 418.

[2] *Lyell* v. *Sanborn*, 1 M. R. 313; *Union Co.* v. *Rocky Mt. Bank*, Id. 432.

nership assets, if a retired partner still continues bound by the note, he has nevertheless parted with his equity to have the partnership debts paid out of the partnership property, and if a proper, is certainly not a necessary, party to the proceeding.

Survivorship. A mining partnership is not dissolved by the death of one of the partners; and the survivor has no right to take control of the property. Such a rule only applies where the *delectus personæ* exists.

Damages—Sluicing away bed-rock and re ervoir. Damages allowed by the referee for the washing away of bed-rock by the plaintiff in sluice mining, which, from the facts found, were altogether hypothetical, were properly stricken out by the court below; but damages for the destruction of defendant's reservoir, should have been allowed.

Appeal from the District Court of the Fourteenth Judicial District, Placer County.

There was a judgment in this case in February, 1869, dismissing the action as to the defendants Robert O. Cravens, Mary J. Cravens, J. Willis Low and Ezra S. Bradlee, dissolving the partnership known as the "Dardanelles Mining Company," existing between the plaintiff, defendant Clark, and the estate of William R. Longley, deceased, and ordering a reference to take an account as to the partnership affairs as between the said partners, and as to their transactions with the defend ants Robert Winspear an l John M. Miner.

In its findings, upon which the foregoing judgment was based, the court below, after reciting the facts, proceeded as follows:

"From the foregoing facts I find as matters of law: First, that said promissory note set forth in the complaint, dated August 1, 1862, has been fully ratified and confirmed by said Dardanelles Company, and is to be held as the note of said company," etc.

The referee, J. I. Fitch, Esq., filed his report in August 1869. He found, among other things, that J. Russell Glover in December, 1867, acquired from the plaintiff one half share of his said two and one half shares, and that, at an election held in that month, Glover was put in the place of Clark for superintendent. As to the injuries occasioned by the washing away of the bed-rock, the referee reported as follows:

"XVIII.—The Dardanelles Company, in working their claim, did not clean up their bed-rock very closely, but saved the rock for future working. The rock contained gold in considerable quantities, in places to the depth of four or five

feet, and was sufficiently soft to enable the workmen to 'pick it up.' The rock was of such a character that the gold could not be extracted by ordinary sluice washing. This rock was regarded by the company, and all others acquainted with it, as valuable, and had been saved by the company to be worked only when they had determined upon the proper mode, and were prepared with the means of working accordingly. Clark had, during several years, subjected this rock to various tests and experiments, to determine the proper mode of working it. The result of these experiments was the conviction that but a small part of the gold could be obtained by the usual sluice washing; that if it was to be worked by sluicing at all, that the tailings should be caught, allowed to lie and slake in the air for a considerable time, then sluiced again, and this operation to be repeated four or five times. In the experiments referred to quite satisfactory results were had, by first burning or heating the rock and afterward washing it. The most satisfactory result, however, was obtained by crushing the rock before washing it. In the summer of 1867 Clark was offered, by two parties, $15,000 for this bed-rock, and desired to sell it; but plaintiff would not consent. One of the parties, the Chinaman who bought the tailings, offered $8,000 cash, and the balance in installments; and the other $10,000 cash, and the balance to be paid afterward. During the last winter Jones and Glover have picked up and sluiced down the cañon about half of this bed-rock, and have not realized from it more than enough to pay expenses. Clark forbid Jones from working this rock. Jones and Glover knew of the experiment made by Clark, and knew that it had long been the opinion of the company that the gold could not be extracted by the ordinary sluice washing. Jones, on the trial, claimed that as much of the gold was saved in the way he worked it as in any other; that the cañon was more than a mile long, and is owned by the company, is very steep and rocky, and that the gold would be freed in its passage down the cañon.

"XIX.—On the 20th day of January, 1869, plaintiff, Jones, and said Glover, made a contract with the Oro Company, which owns mining claims adjoining the Dardanelles claims, by which it was agreed that the Oro Company could wash its dirt through a tunnel and flume of the Dardanelles Company,

about seven hundred feet, until this flume united with a flume through which the Dardanelles Company washed, and that then the earth and water of the Dardanelles claims should mingle with those of the Oro, and the two companies should divide the gold that came out after they mingled, in the proportion that the amount of gold taken out of the Dardanelles above this point bore to the amount of gold that came out of the Oro above this point. The contract also allowed water which plaintiff was selling to the Oro Company, from his own ditch, to be run into the reservoir of the Dardanelles Company, and mingle with the water of the Dardanelles ditches, and run in the Dardanelles pipe from the reservoir down onto the claims, where, from the lower end of the pipe, it was used in both the Oro claims and the Dardanelles, along with the water that came through the Dardanelles ditches. Under this contract $2,379.30 have come out of the joint tailings of the Oro and Dardanelles, which is in the hands of said Jones, and of which he charges himself with $1,906.10, leaving a balance of $473.20, which he claims he must pay to the Oro."

In reference to the reservoir, the referee found, "That during the spring of 1869, plaintiff entered into a contract with one Story & Co., by which it was agreed that said Story & Co. should wash away the reservoir as a mining claim, and said plaintiff should furnish the water to do so out of his own ditch, called the "Miners' Ditch," and said Story & Co. should have half the gold, and plaintiff the other half; that said plaintiff has now received $600 under said contract from Story & Co., and admits that there is considerable gold not cleaned up, which, he says, may amount to $1,000; that one third of the reservoir and ground on which it stood is now washed away, and is destroyed as a reservoir, and Story & Co. are still washing away the remainder of it; that Clark, claiming to act as superintendent, forbade Jones and Story & Co. from washing it away. The plaintiff has charged in his account of disbursements $1,934 as cash paid to himself for water which he claims to have furnished to the Dardanelles claims from his own ditch, called the "Miners' Ditch," from the 27th of December, 1868, to the 3d of May, 1869. Clark, as superintendent, forbade Jones from furnishing any water to the Dardanelles Company. I find, also, that Jones did not furnish but two thirds the amount of water for which he has charged."

Among his conclusions, the referee reported as follows: "I find, as a fact, that the working of the bed-rock of the Dardanelles claim, by Jones and Glover, described in paragraph eighteen of this report, was done in a negligent and careless manner, and that the company thereby sustained a loss of $7,500; and, as a conclusion of law, that the work done by them was unlawful, and wrongful, and negligent, and Jones should be charged with the loss to the company, to wit, $7,500. I find, as a fact, that the Dardanelles Company sustained a loss of $1,000 by the washing away of the reservoir described in paragraph twenty of this report; and that, as a conclusion of law, Jones should be charged with that amount."

Upon the coming in of the report plaintiff filed exceptions to it, and especially to the allowances against Jones, above mentioned. To these exceptions defendants objected, on the ground that the only mode of remedying defects or errors (if any existed) in the report, was by motion for new trial. The court overruled defendants' objections and sustained plaintiff's exceptions so far as they related to the items of $7,500, for loss by washing the bed-rock, and $1,000, for loss by washing away the reservoir. Final judgment was then entered in accordance with the report of the referee, thus amended, and in favor of the plaintiff. Defendants moved for a new trial, which having been denied, they appealed.

CHARLES A. TUTTLE, for appellants.

JAMES F. HUBBARD and JO. HAMILTON, for respondent.

By the Court, TEMPLE, J.

On the 1st day of August, 1861, the Dardanelles Mining Company, a mining partnership, was in possession of and was working certain mining claims of the class known as hydraulic diggings, at Forrest Hill, Placer county.

At that time the company consisted of seven partners, one of whom, Longley, who owned nearly one half of the mine, to wit, six and one half fifteenths, was manager. On that day Longley, professing to act as the agent of the company, and for the purpose of supplying the company with water to

work their claims, purchased certain ditches for the sum of $14,000. The plaintiff held mortgage liens upon the ditches amounting to $11,000. By agreement between Longley, as agent of the partnership, and the owners of the ditches, the sum was to be paid to plaintiff. The plaintiff assented to the arrangement, and Longley, acting for the company, executed to him a note for that sum, due one year from date, with interest at two per cent. per month. In consideration of this note plaintiff released his mortgages. It does not appear that any members of the company took part in the negotiations for the purchase of the property, or expressly agreed to the transaction, except Longley and one Clark, who at the time owned one and three fourths fifteenths in the company. Clark assisted in negotiating the trade, knew of the note given to plaintiff, and assented to it. The company took immediate possession of the property purchased, and have ever since continued to use the water of the ditches in working their claims. The members of the company must have known of the purchase at the time, and of the existence of the debt, and shortly after, as is proved and found, knew of the fact that the note had been given to plaintiff in part payment, and that the sum of $3,000 was paid on account of the purchase from the partnership funds. There is evidence tending to show that most, if not all, of the members of the company knew of the contemplated purchase before it was consummated; but there is no express finding upon this fact.

On the 19th day of August, 1862, Longley, still acting as superintendent, took up the first note given, and gave a new note in lieu of it, in the words and figures following:

"$11,000. For value received, one year after date, for and on behalf of the Dardanelles Mining Company, I promise to pay to Willis Jones, or order, the sum of eleven thousand dollars, with interest at two per cent. per month, payable semi-annually.

"WILLIAM RUFUS LONGLEY,
"Superintendent of Company.

"TODD'S VALLEY, August 1, 1862."

It does not appear that Longley had express authority to execute this note from the company, or any of its members; but there is a finding that each of the members afterward

knew of the fact, and assented to the giving of the note. On the 12th day of August, 1862, prior to giving the new note, Clark, at the request of Longley, paid the interest on the note out of the partnership funds.

Longley died in June, 1863. Clark then became superintendent and manager of the mine, and as such paid upon the note from the partnership funds the following sums upon the dates mentioned: July 28, 1863, $2,540; February 1, 1864, $1,200; August 8, 1864, $200; August 27, 1864, $1,000; February 2, 1865, $1,200.

All these payments were known to the other members of the company, who made no objection. It does not appear that any member of the company has ever objected to the purchase, or complained that it was made without authority. All the members of the company also acquiesced in the payment of the interest, and do not seem, even to the last, to have objected to these payments as made without authority; but objection was made that the note was so worded as not to bind the company, for in the answer they admit that Clark, as superintendent, made the payments because he and the company, not having consulted counsel, supposed that the note was so worded as to bind the company.

The plaintiff, in October, 1866, became the owner of an interest in the company, and afterward commenced this action to obtain a dissolution of the copartnership, to have an account taken, and to have his note paid from the partnership assets. At the time the suit was brought, Clark was the only member of the firm who was also a member at the time the purchase was made, or at the time the note was given. All who subsequently became owners by purchase knew, at the time of the purchase, of the existence of the debt to plaintiff, and of the note given to secure it.

The findings and judgment are in favor of the plaintiff, and defendants' motion for a new trial being denied, this appeal is taken from the order and from the judgment.

The note purports to be executed for and on behalf of the company, and is signed by Longley as superintendent. The mode of executing it corresponds very nearly with some of the cases mentioned in section one hundred and fifty-four, Story on Agency; and there can be no doubt that it is bind-

ing on the partnership, provided Longley had authority to execute it, or it has been subsequently ratified by the company.

The company being a mining partnership, managed by a superintendent, it follows that the superintendent could not bind the partnership, except upon such contracts as are usual and necessary in the ordinary prosecution of the work. He could purchase the supplies and materials necessary for the usual working of the mine upon credit, but could not bind the concern by promissory notes or bills of exchange, unless specially authorized. Such authority might, of course, be conferred by the articles of association, or might be established by proof of general usage of similar companies in this country; but no such proof was adduced in this case. Longley, therefore, had no authority, as superintendent, to purchase the ditch property, or to give the company's note in payment. There must have been special authority for that purpose, or his acts must have been afterward ratified, or the partnership would not be bound.

The answer of Clark, Winspear and Miner denies the partnership, but admits that the ditch property was purchased by the persons alleged to be members of it, as tenants in common. It denies the authority of Longley to give the note for the company, but avers that he was furnished by some of the parties interested with all the money necessary to pay for the property. It is found that the company was a mining partnership, and the evidence fully sustains that finding. The defendants failed to prove the allegation as to the advance made to Longley to enable him to make the purchase. It may be considered, therefore, as settled beyond controversy, by the admissions and by the evidence, that Longley was authorized to make the purchase, and that there remained due, on account of the purchase from the company, eleven thousand dollars. Plaintiff has not attempted to prove any special authority in Longley to execute the note on behalf of the company, and the only question in regard to it is, whether it is shown to have been ratified. The court finds several facts which, in the opinion of the court, tend to establish the fact of ratification, and then finds, as a conclusion from them, that the note has been fully ratified and confirmed by the company.

This was the ultimate fact to be ascertained, and it is none the less a finding of fact because it is stated as a conclusion from other stated facts.

But it is claimed that this finding is not justified by the evidence. It is true there is no evidence that the note was authorized by the company at a company meeting, or that it was adopted in that manner after it had been executed by Longley. Nor is there any evidence either of the practice of this particular company, or of usage in similar companies, which would show the necessity of such action. Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships, except so far as the general usage of persons engaged in similar pursuits, or the established practice of the particular company has established a different rule. The only difference generally existing, as established by the decisions of this court, are such as legitimately flow from the fact that in such partnerships there is no *delectus personæ:* Bainbridge on Mines, 425.

The partnership was bound for the money at the time the second note was given, even if the first were invalid. They were using the property to purchase which the indebtedness was incurred, and the evidence shows that all agreed that the purchase was a beneficial one for the company. All knew soon after the note was given, of its existence, and certainly then believed it to be a company note, for they aver in the answer that they supposed it was so worded as to bind the company. No one can be supposed so ignorant as to have thought it would bind the company, no matter how it was worded, if given without authority, and in a matter in which the company had no concern. All acquiesced in paying interest upon the note until long after the debt would be barred, if the note were held invalid. Under such circumstances, justice and fair dealing require that they should be estopped from disputing its validity.

The case differs widely, upon the question of ratification, from the cases of *Skillman* v. *Lachman*, 23 Cal. 198, and *McConnell* v. *Denver*, 35 Cal. 365. In the first case it appears affirmatively that Lachman did not authorize the note, and had in no way recognized its validity. In the case of *McConnell* v. *Denver*, the note was given contrary to the

terms of the contract, and had not been recognized as valid in any way. The proceeds of the ditch had been paid on account of the indebtedness, in accordance with the terms of the original contract of sale.

The note being established as a valid contract, binding upon the partnership as such, the partnership continued liable, at least to the extent of the partnership assets although some members of the company had in the meantime parted with their interests in the concern. The new members purchased with full knowledge of the indebtedness and of the note, and of course took their interests subject to the payment of the partnership debts: *Duryea* v. *Burt*, 28 Cal. 569.

But it is contended that Hernsley, Cummings and Baker, who were partners at the time the note was given, and who sold and transferred their shares before the commencement of this action, ought to have been made parties. If this were an action upon the note there would be some plausibility in this position. Ordinarily, when a partner retires from a firm he continues personally liable for the indebtedness, unless the new firm has assumed the debt and the creditor has taken them for it. If, in the case of a mining partnership, the retiring partner still continues bound, he, nevertheless, has parted with his equity to have the partnership debts paid out of the partnership property. The purchaser, however, having taken his interest subject to the debts, has no claim to recover against his vendor for any debts which may be paid out of the partnership assets. The former partners, therefore, have no interest except consequentially, in this proceeding, and, if proper, are certainly not necessary parties to it.

At the time the note was given, it appears that a mortgage was executed by Longley upon the property of the company to secure it. This mortgage, like the note, was executed for and on behalf of the company, and purported to be an incumbrance upon the property of the partnership, and not upon Longley's interest in it. This being a proceeding by one of the partners to obtain a dissolution of the partnership, and to have the partnership assets applied to the payment of the firm debts, and there being no other creditors, it is not material to inquire whether this instrument is valid or not. The plaintiff does not appear here primarily as a creditor, but as a partner

seeking a dissolution of the company and a settlement of its affairs. If he is entitled to a dissolution the other relief must follow. There appears to have been no agreement that the partnership should continue for a fixed term, nor was any custom shown which could affect the question of duration. If it were otherwise, however, sufficient cause for a dissolution was shown. As the partnership was not dissolved by the death of Longley, Clark had no right, as survivor, to take control of the property. This rule can only apply where the *delectus personæ* exists, and the partnership is dissolved by the death of a partner.

The character of the interest which Glover had acquired in the partnership, if any, is not shown. Had it been, it may be that it would have appeared to the court that he was not a necessary party. He may have had no transfer of any interest, but only a promise, from Jones. At all events he is not shown to have been a necessary party.

The exceptions to the findings were properly overruled. The additional findings asked for were either immaterial or are the probative facts merely.

It was not necessary upon a reference, such as was had in this case, to move for a new trial in order to have the report modified by changing some of the findings of the referee: *Harris* v. *San Francisco Sugar Refining Co.*, 41 Cal. 393.

The facts found by the referee in regard to the injury by washing away the bed-rock by the plaintiff, show that the damage was altogether hypothetical. There is no evidence of bad faith in the matter. Upon this state of facts the allowance was properly stricken out.

The allowance of one thousand dollars for washing away the reservoir, seems correct. It was virtually disposing of the property of the company, and Jones should be made to account for the value of it to the company. The allowance of one thousand dollars by the referee seems reasonable, and if it were too much this would not authorize the court to reject the demand altogether. The decree should be modified in this particular, by charging the plaintiff with this sum of one thousand dollars, as found by the referee.

Ordered that the case be remanded, with directions to modify the decree in accordance with this opinion.

TAYLOR v. CASTLE ET AL.

(42 California. 367. Supreme Court, 1871.)

[1] **No delectus personæ in mining partnerships.** It is well established that in mining partnerships there is usually no *delectus personæ*, and because of this peculiarity the partnership is not dissolved by the death of a partner, nor as a consequence of a sale of an interest by a partner to a stranger.

Purchaser becomes presumptively partner. One who purchases an interest in mining claims owned by mining partners presumptively becomes one of the partners, though he takes no part in the management of the partnership affairs, and never holds himself out to the world as a partner.

[2] **Usage of the firm—Mode of contracting.** Where a contract in writing, by which the plaintiff bound himself to erect a mill for defendants, purported to have been made by a mining partnership in its firm name through its secretary, and it appeared that such contract had been authorized by a vote of a majority of the shares at a meeting of the company, and after being signed by the secretary had been ratified and approved in the same manner, and it further appeared that though there were no written regulations or by-laws the company usually did business in this way: *Held*, that the recognized and established usage on the part of the firm should be taken as a part of the contract of partnership.

Former judgment for same cause, a bar. A judgment in a former action is well pleaded in bar of a suit for the same cause of action although the form of action has been changed.

Idem—Test of what is res adjudicata. The cause of action is said to be the same where the same evidence would support either action.

Appeal from the District Court of the Fourteenth Judicial District, Nevada County.

This was an action to recover the sum of three thousand dollars, the contract price for building a mill, alleged to be due from defendants as a mining partnership, doing business at Grass Valley, Nevada county, under the firm name and style of the New York Hill Mining Company. The defendants Castle and Seligman, in their answers, denied, among other things, that they or either of them were ever members of the partnership, or ever authorized or consented to the contract sued on, or were ever in any manner bound thereby;

[1] *Kahn* v. *Smelting Co.*, 11 M. R. 540; *Jones* v. *Clark*, Id. 474.
[2] *Mining Co.* v. *Anglo-Cal. Bank*, 104 U. S. 192.

and they also set up, as a bar to the action, a judgment in their favor in a former action, brought by plaintiff against defendants for the same cause of action.

It appears that previous to the making of the contract for building the mill, the defendant Castle purchased the interest, being a one sixteenth, of P. H. Ford, one of the original partners of the New York Hill Mining Company, and afterward sold one half of such sixteenth to the defendant Seligman. Neither Castle nor Seligman, however, attended the meetings of the partnership, and there was nothing to show that they ever personally approved or consented to the contract of the company with the plaintiff.

The former action, which was pleaded in bar, was a suit by the same plaintiff against the same defendants, to recover the sum of two thousand six hundred and fifty dollars, alleged to be due on an accounting between the parties for building the mill under the same contract set up in this action. In that case there was a judgment in favor of defendants Castle and Seligman for their costs, and it was ordered, on plaintiff's motion, that the cause should be dismissed as to the other defendants, without prejudice to plaintiff's right to a new action.

On the trial the defendants Castle and Seligman rested their defense upon their plea of former recovery, and introduced in evidence the judgment roll in the former action. The court below decided against their plea, and the cause then proceeded and resulted in a judgment for plaintiff against all the defendants for three thousand two hundred and eighty-five dollars and eighty cents. The defendants Castle and Seligman moved for a new trial, which was overruled, and they then took this appeal.

G. F. & W. H. SHARP, for appellants.

A. C. MILES and J. C. DEUEL, for respondent.

By the Court, TEMPLE, J.

It may be a matter of regret that our courts have gone to the extent they have in excepting mining partnerships from the general law of partnerships. It is very well established

now, however, that in such partnerships there is usually no *delectus personæ*, and from this difference many peculiarities arise, the principal of which is that the partnership is not dissolved by the death of a partner, nor as a consequence of a sale of an interest by a partner to a stranger. As, therefore, the sale of an interest to Seligman did not dissolve the partnership, I think by his purchase he presumptively became a partner, although he took no part in the management of the partnersh p affairs, and never held himself out to the world as a partner.

The action is brought upon a contract by which the plaintiff bound himself to erect a mill for the defendants. The contract is in writing, and purports to have been made by the defendants by their firm name, through James K. Byrne, their secretary. It was proven that the contract was authorized at a meeting of the company, and, after it had been signed by the secretary, was ratified and approved in the same way. There were no written regulations or by-laws adopted for the government of the company, but it was shown that they usually did business in this way. A majority of the shares at a meeting of the company authorized contracts to be made, and the minority always acquiesced. I think this shows a recognized and established usage on the part of the firm which must be taken as a part of the contract of partnership.

The defendants Castle and Seligman pleaded a former recovery in bar, and, on the trial, introduced the judgment roll of a former action brought by the same plaintiff against the same defendants. In his complaint in the first suit the plaintiff recited the fact of the contract to erect a mill for crushing rock, the performance of the contract on his part, and the non-payment of the contract price, and then averred an account stated between plaintiff and defendant, the ascertainment of a balance due, which was less than the contract price, and the promise on the part of defendants to pay that sum.

The defendants, in their answer, denied specially each allegation of the complaint. Judgment was for the defendants, but it does not appear upon what grounds. No evidence upon the subject was offered by either party, save the judgment roll, and the admission that the contract sued upon in this action was put in evidence upon the former trial.

Unquestionably the judgment in the former action is well pleaded as a bar in this suit, provided the cause of action is the same, although the form of action has been changed. The cause of action is said to be the same where the same evidence will support both actions; or, rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain a judgment for the plaintiff in the present action would have authorized a judgment for the plaintiff in the former. The present action could be maintained upon proof of the contract and performance on the part of plaintiff, and non-payment by defendants. This proof would not have sustained the former action. That was founded on the account stated and the agreement to pay the balance ascertained, and not upon the original contract: *Carey* v. *P. & C. Petroleum Co.*, 33 Cal. 694.

Judgment and order affirmed.

Mr. Justice CROCKETT did not participate in the foregoing decision.

CRATER v. BININGER.

(45 New York, 545. Court of Appeals, 1871.)

Suit by partner upon note of copartner. C., B. and S. with others composed a joint stock association, unincorporated, and known as the Oil Creek Petroleum Company. B. and S. were the active managers of the association, and, for the purpose of raising money to pay off certain company indebtedness, B. executed a promissory note to the order of S., which S. indorsed and which was discounted by a bank in New Jersey, and upon its maturity was paid by C., to whom it was transferred. C. then brought suit against B. upon the note: *Held*, that the note was not a partnership note, and the fact that the money raised upon it was applied to the payment of debts of the association, presented no obstacle to the suit by C.

[1] **Partner against partner upon segregated item of demand.** An action by one partner will lie against his copartner, if the contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts.

[1] *Bean* v. *Gregg*, 7 Colo. 499.

Verbal agreement to vary note. In a suit by one partner upon a note executed by his copartner the defense was that the plaintiff agreed, at the time of the making of the note, to provide for and pay one third thereof, if the company should not be in funds for that purpose when it became due: *Held*, that the facts if proved would not constitute a defense; that it would be incompetent for the defendant to vary the terms of the note, or relieve himself from liability thereon, by evidence of a verbal agreement made before or at the time of making the instrument.

Appeal from the judgment of the general term of the Supreme Court, in the First Judicial District, affirming the judgment upon a decision of the judge without jury, in favor of the plaintiff.

The action is against the defendant as maker of a promissory note to the order of and indorsed by one Sanger. The plaintiff, defendant, Sanger, and several others, composed a joint stock association (unincorporated), known as the Oil Creek Petroleum Company. In their operations the company became indebted to their agents and employes, and this note was made for the purpose of raising money to pay off the indebtedness of the company, and was discounted by a bank in New Jersey, and on its maturity was paid by the plaintiff, to whom it was transferred. The defense was that the plaintiff agreed, at the time of the making of the note, to provide for and pay one third thereof, if the company should not be in funds for that purpose when it became due. Some evidence of such an agreement was given by the defendant. The cause was tried by the court without a jury, and judgment was given for the plaintiff, which was affirmed at general term of the Supreme Court.

SIMEON E. CHURCH, for the appellant; cited *Ives* v. *Miller*, 19 Barb. 196; *Francisco* v. *Fitch*, 25 Barb. 130; *Sherwood* v. *Barton*, 36 Barb. 284; *Traders Bank of Rochester* v. *Bradner*, 43 Barb. 379; *Freeland* v. *VanCampen*, 1 Keyes, 39; 2 Abb. Dec. 184.

SAMUEL HAND, for the respondent; on the question that parol evidence could not vary the note: Chitty on Bills, 47; *Hoare* v. *Graham*, 3 Camp. 57; *Rutland's Case*, 5 Rep. 25; Parsons on B. & N., Vol. 2, p. 501; *Sice* v. *Cunningham*, 1

[1] *Braly* v. *Henry*, 11 Pac. 385.

Cow. 397; *Babson* v. *Webber*, 9 Pick. 163; *Eaves* v. *Henderson*, 17 Wend. 190; *Ely* v. *Kilborn*, 5 Den. 514. Upon the question of the note being to raise money for partnership purposes: *Gridley* v. *Dole*, 4 N. Y. 486; *VanNess* v. *Forrest*, 8 Cranch, 30.

ALLEN, J.

The defendant and Sanger, the indorser of the note in suit, were the active promoters and principal managers of the company for whose benefit it is claimed the note was made. The other associates, including the plaintiff, appear to have had but slight personal connection with the business of the association. There is no evidence that the plaintiff was at any time a party to the note as indorser, or otherwise. His agency was confined to the discounting, or the procuring the same to be discounted by a New Jersey bank. If there is any evidence that he undertook to provide for or pay any part of the note, it is very slight. The only witness to the fact is the defendant, and after stating very generally that he understood that himself, Sanger and the plaintiff should take care of the note, but without being able to refer to any conversation with the plaintiff from which he formed his opinion, he finally said: "I will not swear positively that Mr. Crater said he would pay one third of the note, but I understood Sanger so, and it was implied that we three were to take care of the note," and there left it. The evidence came very far short of proving any agreement by the plaintiff to relieve the defendant from the liability he assumed as maker of the note. The judge, upon the trial, with the assent of the parties, discharged the jury and himself decided the issues of fact and law. He does not find that an agreement was made by the plaintiff as alleged, nor was there any request to find such fact, or exception to the refusal or omission to pass upon the question. Neither is there any fact found showing any connection of the plaintiff with the origin or consideration of the note, or any business relation or connection between the plaintiff and defendant. The judge merely finds the making of the note by the defendant, and the indorsement thereof by the payee to the plaintiff before maturity, and for value and amount d e

and unpaid thereon. But if the facts alleged had been proved upon the trial and found by the judge, they would have constituted no defense. It was incompetent for the defendant to vary the terms of the note, or relieve himself from liability thereon, in whole or in part, by evidence of a verbal agreement made before or at the time of making the instrument: *Ely* v. *Kilborn*, 5 Denio, 514; *Eaves* v. *Henderson*, 17 Wend. 190.

The relation of the parties to each other as partners with others, in connection with the fact that the note was made for the business purposes of the partnership, and that the money realized from its discount was applied to the payment of the debts of the association, presented no obstacle to an action upon the note by the plaintiff, who had advanced the money upon the credit of the parties to it. The note was not a partnership note; it was not given by or to the firm. It was given by one member of the partnership to another, upon a good consideration, and an action upon it did not involve an examination of the partnership accounts. In *Van Ness* v. *Forrest*, 8 Cranch, 30, it was held that a promissory note given by one member of a commercial company to another member for the use of the company, would maintain an action at law by the promisee in his own name against the maker, notwithstanding both parties were partners in that company, and the money when received would belong to the company. A case in more close analogy to this, as the facts are claimed by the defense, is *Gridley* v. *Dole*, 4 N. Y. 486. There one of two partners, after dissolution of the copartnership, had advanced money to the other to be applied in payment of the partnership debts, taking a promissory note for the money advanced. Evidence of a contemporaneous verbal agreement that the note should be paid out of the effects of the firm, and if such effects were not sufficient, then that the lender should pay a portion of the note, was held inadmissible. An action will not lie by one member of a partnership against another upon an implied promise, and if the plaintiff had paid the demands against the firm he could not have maintained an action against his associates upon the implied promise to repay him; but one partner can maintain an action against his copartner upon an express promise, although connected with the partner-

ship business: *Townsend* v. *Goewey* 19 Wend. 424. Judge Gardner, in *Gridley* v. *Dole*, *supra*, says: "If one partner gives the other his promissory note or separate acceptance for value received, on the partnership account, an action will lie on such note or bill." Citing Collyer on Partnership, § 269, and 1 Anst. 50.

If the evidence is referred to, it will be seen that the plaintiff refused to advance the money except upon a note made by the defendant and indorsed by Sanger; and as he was under no legal obligation to advance the money, he had a right to impose the conditions and prescribe the security, and the contract then made can not be varied by any cotemporaneous or prior verbal agreement, or affected by the business relations of the parties: Lindley on Part. 735; *Fox* v. *Frith*, 10 M. & W. 131; *Bedford* v. *Brutton*, 1 Bing. (N. C.) 399; *Sedgwick* v. *Daniell*, 2 H. & N. 319. There is no rule forbidding one partner to sue another at law in respect of a debt arising out of a partnership transaction. If the obligation or contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts, an action will lie by one partner against his copartner: *Worrall* v. *Grayson*, 1 M. & W. 166. The advance of the money upon the security of the note in suit for a special purpose connected with the partnership business was separate and distinct from the general partnership dealings, and an action upon it does not involve an examination of the partnership accounts. It was an independent transaction between two of several partners, and the contract is valid and may be enforced at law. The judgment should be affirmed.

All concurring except RAPALLO, J., not voting.

Judgment affirmed.

DECKER ET AL. v. HOWELL ET AL.

(42 California, 636. Supreme Court, 1872.)

Partnership note—[1] Strict partnership by agreement between mining partners. Howell and Haynes entered into an agreement to engage together in a mining adventure, under the firm name of "Howell & Haynes," the profits and losses to be shared equally, etc., etc. Howell borrowed of the plaintiff in the name of the firm and for its use the money for which the note in suit was given: *Held*, that while in case of an ordinary mining partnership one partner has no authority to bind the other by a firm note, yet there is nothing in the nature of the business of mining which forbids a contract of strict partnership subject to the incidents of a trading partnership, and that the contract in this case constituted a partnership in the ordinary sense, so that both Howell and Haynes were bound by the note.

Appeal from the District Court of the Tenth Judicial District, Yuba County.

This was an action upon a promissory note for three thousand dollars, made in the name of "Howell & Haynes," to R. M. Turner, and by Turner indorsed to plaintiffs. Howell and Turner made default. Haynes answered separately, setting up, among other things, that "Howell & Haynes" was a partnership formed for the sole and exclusive purpose of mining, and that Howell had given the note without Haynes' knowledge or authority, and in fraud of his rights. On the trial the court below found the facts substantially as stated in the opinion; but in addition thereto found that after the making of the note Howell conveyed all his interest in the partnership to Haynes, in consideration that he would pay certain claims, including the note in question. As conclusions of law the court found:

First. That the defendants, Howell and Haynes, were copartners in the working and management of their mines and mill.

Second. That a copartner in a mining partnership has not in any case implied authority to borrow money on the credit of the partnership, nor to execute or deliver a promissory note in the partnership name for any purpose, and, consequently, that the defendant Howell had no implied authority

[1] *Sauntry* v. *Dunlap*, 12 Wis. 407.

to execute or deliver a note in the partnership name to the plaintiffs for the money borrowed from them, and that the fact that the money borrowed was used to pay the wages of the laborers on the mine and for supplies therefor can make no difference.

Third. That the defendant Haynes, by his ratification of the acts of the defendant Howell in the making and delivery of the note in suit, became, and now is, liable to pay to plaintiffs the amount due on said note.

As a further conclusion of law the court found that the plaintiffs were entitled to judgment in the sum of four thousand nine hundred and sixty-four dollars and twenty-five cents, for principal and interest on the note, and rendered judgment accordingly. Defendant Haynes moved for a new trial, which being denied, he took this appeal from the judgment and order.

JAMES C. CARY and CHARLES E. FILKINS, for appellants.

W. C. BELCHER and G. N. SWEZY, for respondents.

By the Court, NILES, J.

The defendants, Howell and Haynes, entered into an agreement to engage together in a mining adventure, under the firm name of "Howell & Haynes," for the purpose of purchasing, holding, and working certain mines. The profits and losses were to be shared equally. Howell, a practical miner, was to contribute his skill and personal services in the conduct of the business; Haynes was to contribute money. The mine was purchased by and conveyed to the partners. A note of the firm was given for a portion of the purchase money, and afterward paid without objection by either. The mine was worked for a year under the management of Howell, who then conveyed his interest to Haynes. Prior to this conveyance Howell borrowed of the plaintiff, in the name of the firm and for its use, the money for which the note in suit was given.

The main question in this case is whether Howell had authority, either express or implied, to make the note in suit.

It is well settled that in the case of an ordinary trading partnership either partner may bind the firm by note.

It is equally well settled by the decisions of this court that no such authority exists in the case of an ordinary mining partnership. The decision in *Skillman* v. *Lachman*, 23 Cal. 206, and the subsequent cases, place this exception to the recognized rule as applicable to trading partnerships, upon the ground that in mining partnerships the *delectus personæ* does not exist, and the membership is continually subject to changes beyond the control of the partners. But it is no disparagement to the salutary doctrine of these cases to hold that a strict partnership may exist in the working of a mine which shall be subject to the incidents of a trading partnership. There is nothing in the nature of the business of mining which forbids such a contract. If, by the terms of a contract of mining partnership, it appears that the confidential relations of an ordinary partnership are established, and that the firm is not subject to the intrusion of other partners at will, the reason of the rule that restricts the powers of a single partner fails. The parties are strictly partners, not by reason of their common ownership of the mine, but as the result of their own agreement. The cases of *Bradley* v. *Harkness*, 26 Cal. 76, and *Duryea* v. *Burt*, 28 Cal. 587, recognize this principle.

In Bainbridge on Mines, 439, the author says: "But there are mining concerns which are carried on by partners, few in number, subject to mutual selection, and therefore more closely connected by mutual confidence. * * * There may be no difference between firms of this kind and those engaged in any other distinct business as general partners, and those who are not working partners may not be the less liable to the general consequences of such a partnership."

I am of opinion that the agreement between Howell and Haynes was a contract of partnership in the ordinary sense. Each exercised his choice in the selection of the other as his copartner. If either had conveyed his interest in the mine to a stranger, the purchaser would not, by virtue of the sale, be subrogated to his rights under the agreement. The purchaser and remaining partner would then become tenants in common of the mine and in its working, subject to the rules applicable to an ordinary mining partnership.

Judgment affirmed.

Mr. Justice SPRAGUE did not participate in this decision.

BUTTERFIELD V. BEARDSLEY ET AL.

(28 Michigan, 412. Supreme Court, 1874.)

[1] **Joint stock association.** The members of an unincorporated joint stock association engaged in boring for oil, sustained by money advanced by each, may, in a proceeding for the distribution of a common fund, be treated as partners.

Necessity of exceptions to report of master. As a general rule the report of a master, or a commissioner acting as master, is received as true when no exception is taken, and parties who are dissatisfied with such a report should except to it or take some other action appropriate to the objection.

[2] **Subject-matter of jurisdiction in equity.** The controversy in this case, which was one relating to the distribution, among members of an unincorporated joint stock association, of the common fund arising from the final disposition of the entire assets of the company, is held to be one for equitable cognizance.

Legal title to common fund in third parties. Where property belongs in equity to an association of members, each having an undivided interest in whatever belongs to the company, it is of no consequence in a controversy over the distribution of the proceeds of the sale of the property authorized by the general consent, that the legal title stood in a third person.

Distribution of proceeds of sale of entire stock—Equity jurisdiction. Where the property of a joint stock association, unincorporated, has been disposed of on the basis of the payment by the holder of a portion of the shares of such company, of a certain sum on account of the entire interest of all the other shareholders in such a manner as to extinguish all claim on his part upon the sum so paid, in a suit between the residue of the shareholders for an equal distribution of the proceeds of sale, his former interest in the company will have no bearing on the result. The sale will not be regarded as merely a transfer of individual certificates of stock, but as a final disposition of the entire assets of the company, and the case will be held to be one for equitable cognizance.

Articles of association not signed by shareholder. Under articles of association providing that the ownership of a certificate should carry with it an undivided interest in all company property, the fact that a subsequent purchaser of a certificate had never subscribed the articles is of no consequence as affecting his right to a ratable share of the proceeds of a sale of the company's property.

Appeal in chancery from Oakland Circuit.

CROFOOT & BREWER and A. C. BALDWIN, for complainant.

[1] *Bullard* v. *Kinney*, 11 M. R. 348; *Hedge's App.*, Id. 463.
[2] *Von Schmidt* v. *Huntington*, 6 M. R. 284.

C. & W. N. DRAPER and O. D. RICHARDSON, for defendants.

GRAVES, Ch. J.

This is an appeal by defendants from a decree of the Circuit Court for the county of Oakland, in chancery.

The suit grew out of a contention respecting the distribution of a fund derived from the sale of certain coal oil property in Pennsylvania. The property disposed of was obtained in one of the many speculative joint adventures which became so common a few years since, and after some vicissitudes it was conveyed away, and the complainant asserted a right to participate in the proceeds; but this claim was denied by the parties who had the handling of the fund.

The earnestness of the defense, and the age and experience of the counsel engaged in it, suggested the propriety of delaying a determination until we should be able to re-examine the whole record with critical attention. That task has now been performed. A complete detail of the cause and of the transactions connected with the subject in dispute would be extremely tedious and would expand our opinion beyond reasonable limits. We find it requisite to content ourselves with a glance at some of the main features. There are some matters which have been dwelt upon which do not appear to us as of any practical importance in the case. Among these we may mention the proceeding called an arbitration.

On the 15th of September, 1860, the defendant Jesse A. Heydrick, an operator in oil enterprises, and who resided in Pennsylvania, and appears to have then owned or controlled certain interests in Venango county in that State, was in Pontiac, and he then and there entered into a contract in writing with the defendants Beardsley, Voorheis, Peck, Morris, Millis and Charles B. Boughner, to convey to them certain of the interests he so owned or controlled, for fifteen thousand dollars. This consideration was to be paid as follows: three thousand dollars in thirty days, three thousand seven hundred and fifty dollars in six months, three thousand seven hundred and fifty dollars in one year, and four thousand five hundred dollars in oil. This was the initial movement, and on the footing of it a joint stock company was organized at Pontiac on the 26th

of the same month. The constitution of the company consisted of fifteen written articles. They declared that the company should be called the Wolverine Oil Company; that the capital stock should be fifteen thousand dollars, in thirty shares of five hundred dollars each, and that each share should entitle the holder to one thirtieth part of all the property which should or might in any wise belong to the company, whether held by any, either, or all of its officers, or by any person or persons in trust for the benefit of the company. This provision as to the right of the shareholder was made fundamental. The articles further provided for a board of directors, a president, secretary and treasurer, and for other agencies. Many precise regulations were embodied relative to management and intended to advance the enterprise of the projectors. The facts tend to show that the interest secured by the agreement with Heydrick was to inure to the company, and that they were to stand in the shoes of those who contracted with him. It is impossible to reflect on the circumstances without being persuaded that the formation of the company was closely connected with this contract, and that the purpose just mentioned was formed and understood by all concerned. The articles were sealed and subscribed and the stock taken by the following persons: Isaac I. Voorheis, two shares; John D. Mills, three shares; Charles B. Boughner, three shares; Orville C. Morris, three shares; Clark Beardsley, two shares; Theodore C. Armstrong, one share; John G. Durkee, one share; Edward W. Peck, three shares; Moses G. Spear, one share; Isaac L. Smith, one share; Jesse A. Heydrick, ten shares.

The company organized and proceeded to carry out their plan. All the shareholders except Heydrick, lived in Oakland county, and the company seem to have treated that as their true domicile. As he resided in Pennsylvania he does not appear to have taken a personal part in their subsequent business meetings in Pontiac. He was nevertheless a member of the company and jointly interested in its property and affairs. The directors met from time to time and made and collected large assessments on the shares. Assessments were made on Heydrick's shares with the rest, up to the 10th of June, 1862, at which time it appears from the company books

the directors assumed to make an assessment of twenty-five dollars and ten cents on each share of the company, "owned in Oakland county."

As after this, however, assessments were sometimes made on all the shares and sometimes not, this exceptional mode of assessment is not easily explained by the record. It is possible that Heydrick, when these special occasions arose, may have paid or advanced an equivalent, or been in some position which, in the opinion of the directors, made it improper to assess him in view of the purpose which the assessment contemplated. In any possible aspect of the matter, it is, however, without influence. In the fall of 1860, Boughner, who was one of the directors, was dispatched to Pennsylvania as a special agent of the company to attend to their interests and to take conveyance of such landed and other interests as they were entitled to or should procure.

Besides the authority springing from the articles, he was furnished with a power of attorney executed under seal, by Beardsley, Voorheis, Smith, Peck, Spear, Armstrong, Durkee and Millis. This instrument, as drawn, included the name of Heydrick, and his name and description as a shareholder was left to stand in it when it was executed and delivered. He was probably in Pennsylvania and his signature was not put to it. Boughner, however, the donee of the power, through some inadvertence, signed it. On the back of this paper Boughner made a declaration in writing under seal, apparently for the benefit and protection of those who employed him and for whom he was to act, that he would execute and perform the business intrusted to him "for the use and benefit of the parties to and members of the Wolverine Oil Company." By this all the members were recognized as interested in what was to be done, and not a part of them merely. Morris subsequently executed and transmitted a similar power. Boughner repaired to Venango, and in a short time obtained valuable interests, and which seem to have consisted of two thirds of the properties described in Heydrick's contract, and to have been turned over pursuant to that contract. These grants, or whatever they were, ran to Boughner. As by the agreement Heydrick was to hold an interest of one third, and by the articles, the property, by whomsoever held, if stock, would

belong to the company, and Heydrick had one third of the shares, it seems to have been understood that he might retain the legal title to one third. We gather that he did so. The consideration for the transfer to Boughner was derived from the company, and the property was in fact that of the company and was so considered by all concerned. The ownership of a few shares changed. On the 11th of April, 1861, the defendant Kellam became a shareholder, he having purchased one of the shares originally taken by Morris, and the defendant Andrews, about November, 1864, acquired the three shares of Boughner. The complainant, some time between the 12th of July, 1861, and the 29th of November, 1864, became owner of one of the shares originally taken by Heydrick. During all this time, so far as we can gather from the record, the property composing capital stock remained a common fund, and in which every shareholder had an undivided interest. These new proprietors all lived in Oakland county, and as a consequence of complainant's purchase, there came to be twenty-one instead of twenty Oakland county shareholders.

The complainant never subscribed the articles. He was, however, regularly put down, recognized and assessed as a shareholder on and after the date last mentioned.

On that day a meeting of the stockholders was held, at which were represented sixteen of the thirty shares, and among them his share. The meeting was adjourned over to the 30th of November, at which time the same shares appear to have been represented.

At this meeting Andrews, who, as before stated, had succeeded to the interest of Boughner, was chosen director in Boughner's place, and likewise appointed agent "with power to sell the interest of the stockholders of the Wolverine Oil Company residing in Oakland county, provided a satisfactory sale could be made." The meeting expressed itself by resolution, to the effect that no proposition for a sale should be favorably entertained which should offer less than four thousand dollars for each and every share of said company owned in Oakland county.

The movements which occurred at this time indicate that there had been overtures to purchase, from some quarter, or at least that something had happened to cause an expectation

that offers to buy would be made. The key to the idea of selling the Oakland county interests as separate and distinct from any other, would seem to be that there were grounds for thinking that Heydrick, who controlled all the other shares and lived in Pennsylvania, and was an operator in oil enterprises, was disposed to buy for himself or others. The inference that the Oakland shareholders were acting upon the notion that Heydrick was to be the purchaser, is strengthened by what soon happened. He did buy. Besides, it is to be noticed that in the summer of 1864 Voorheis had been sent down as agent, and the company were apprised that he meditated a sale of a portion of the interest of the "company" for twenty thousand dollars. They thereupon directed their secretary to advise him not to sell any part of "our interest, in parcels" and not to offer the whole for less than from one hundred to two hundred thousand dollars.

Voorheis continued to make efforts to effectuate a sale, and at this juncture, and for some reason the record does not explain, the company deemed it expedient to send Andrews down also. He was provided with a power of attorney subscribed by Armstrong, Beardsley, Smith, Kellam, Millis, Spear, Peck, Morris, and complainant, and Morris subjoined to his signature the significant qualification, "with the understanding that it shan't be sold less than eighty-four thousand dollars, twenty-one shares."

The names of Voorheis and Heydrick were inserted in the body of this paper as shareholders, and were not erased when it came to be executed and delivered. They were then in Pennsylvania, and did not subscribe. Those who did subscribe must have regarded them as jointly connected in the business. The efforts and negotiations on this occasion appear to have ended in a sale and transfer of all property which had inured to the company in their transactions with Heydrick. The matter is left somewhat obscure by the record, but enough appears to show that Heydrick conducted the negotiations for the buyer, or buyers, and that he either acted as principal or was allowed to deal with the affair as one who was purchasing wholly or in part for his own benefit. If anything belonging to the company stood in his name, the equitable right of the company to it was meant

to be cut off by his purchase. It seems to have been the intent to vest in the transferees the whole beneficial interest to which the company had claim, so as to leave nothing which certificates could represent beyond the fund received in exchange, and to so manage the matter that Heydrick could have no interest in that. The trade was not a sale of stock. It was a complete relinquishment of the ultimate capital and property of the company. When it was consummated the "Wolverine Oil Company" had not simply changed its stockholders. It had parted with its estate. It does not appear that anything was left for certificates to represent but the fund taken in exchange. Voorheis, who seems to have been chief negotiator for the company, first reported that he had sold for eighty-four thousand dollars. A slip occurred, however, and he finally got sixty-two thousand dollars in cash and four thousand shares of oil stock, which is probably worthless. He received the money in Pennsylvania, and at once paid over to Peck twelve thousand dollars as for his share. After his return, and on the 22d of July, 1865, a meeting of the stockholders and directors of the company was held at Pontiac, at which time Voorheis, Armstrong, Andrews, Morris, Peck, Beardsley, Millis, Smith and the complainant were present. It was there voted by the directors that sixty-two thousand dollars should be divided among the Oakland county stockholders, embracing twenty-one shares. This included the complainant's share. At the same time an assessment was made and paid of four dollars seventy-six cents on each of such twenty-one shares to pay an allowed claim of Boughner. On the 12th of August the directors again met at Pontiac, and allowed several claims against the company, including one to Voorheis for his services and expenses. They also assessed each of the Oakland county shares fifty-two dollars and three cents to defray expenses.

On the 13th of September following, however, another meeting of the stockholders and directors was held, at which time Voorheis, Andrews, Peck (by proxy), Morris, Kellam, Millis, Smith, Spear, Beardsley and complainant were present. On this occasion it was resolved that the doings of the meeting on the 22d of July should be rescinded and held for naught, Morris, Voorheis and complainant resisting. A sim-

ilar course was pursued in relation to the proceedings of the meeting of the 12th day of August, Voorheis resisting. At this time a vote of censure was also passed against Voorheis, and he was removed from his office of agent and director. They did not go so far as to return the assessment made and collected on the 22d of July. By these and other movements it became apparent that a controlling number of the associates were determined that the complainant should receive no share of the fund realized by the sale, and at length his right to participation was definitely denied.

In February, 1866, the complainant filed his first bill, but omitted to make Heydrick a party. A demurrer was interposed, and the court sustained the demurrer. The bill was then amended by making Heydrick a party, and was again met by demurrer. This, however, was overruled and all the defendants answered except Heydrick, and the bill as to him was taken as confessed.

We do not consider it necessary to reproduce the matter of the bill, or even to specify the essential parts of it. It proceeds upon the supposition that the complainant and the other associates were, as between themselves, for the purpose of dealing with their community rights, in a court of equity to be considered as partners, and it seeks a winding up of the affairs and an equitable application and appropriation of the effects.

A number of objections were pressed with much earnestness at the hearing. One of them may be here noticed. It was said that the associates were not partners. They certainly had no corporate character, and yet they were embarked in a common undertaking for their common profit, and this common undertaking was sustained, and was agreed to be sustained, by money advanced by each. That their relation and position were such as to justify a court of equity, in order to settle their disputes respecting the distribution of a common fund, to treat them as partners, is a point settled by overwhelming authority. We cite a few of the cases and books bearing on the point: *Beaumont* v. *Meredith*, 3 Ves. & Beames, 180; *Wallworth* v. *Holt*, 4 Myl. & C. 619; *Womersley* v. *Merrit*, L. R. 4 Eq. Cases, 695; *Richardson* v. *Hastings*, 7 Beav. 323; S. C., Id. 301; *Whitman* v. *Porter*, 107 Mass. 522; *Taft* v. *Ward*, 106 Mass. 518; *Harper* v. *Raymond*, 3

Bos. 29; *Mann* v. *Butler*, 2 Barb. Ch. R. 362; *Townsend* v. *Goewey*, 19 Wend. 424; *Cross* v. *Jackson*, 5 Hill, 478; 3 Kent's Com., p. 26; Story on Part., §§ 76, 77, 164, 213; *Burgan* v. *Lyell*, 2 Mich. 102; *Clagett* v. *Kilbourne*, 1 Black, 346; *Brown* v. *Curtis*, 5 Mason, 421; Adams' Eq., 247, 239, 240; Willard's Eq., Chap. 10; Story's Eq. J., §§ 1243, 1255, 1256; *Brown* v. *Gilman*, 4 Wheat. 255.

In February, 1872, the court made an interlocutory decree adjudging that the associates were partners in interest in the property and effects of the Wolverine Oil Company; that their respective interests were co-extensive with the shares they severally held, and that complainant held one share. The decree set forth and declared who were shareholders, and the quantity of interest of each individual; that Heydrick owned and controlled nine shares independently, and governed the interest which they represented, in a manner distinct from the interest represented by the other twenty-one shares, owned in Michigan; that Voorheis, acting as agent for the shareholders, living in Michigan and holding twenty-one shares, sold such shares, with the property they represented, and received a large sum of money and other property, and that the fund so obtained equitably belonged to the complainant and the other Michigan shareholders in the ratio of their shares, and that it ought to be divided among the owners after an adjustment of claims and demands between members and against the company.

The decree then proceeded to refer it to a commissioner to ascertain and report what sales, when, and for what amount, had been made of any of the property, shares or effects of the company by Voorheis or any of the other defendants except Heydrick, the disposition made of the proceeds, the amount passed over to any of the defendants, and whether Voorheis still had any property of any kind derived from any such sale, and whether there were any, and if so what, debts against the company which ought to be paid out of the fund.

The commissioner made his report under this decretal order on the 22d of November, 1872. He found and reported that on or about the 9th of February, 1865, Voorheis, acting as the agent of the Michigan stockholders, sold certain property belonging to them, and received therefor in cash sixty thousand dollars; that he also received in cash from Heydrick two

thousand dollars, and four thousand shares of stock of the Heydrick Brothers' Oil Company; that at a meeting of the Michigan shareholders, July 22, 1865, they recognized the sum of sixty-two thousand dollars as the amount received in cash by Voorheis as belonging to the Michigan shareholders, including complainant.

The commissioner further found that Voorheis paid to Millis, as company treasurer: for Andrews, eight thousand seven hundred dollars; for Spear, two thousand nine hundred dollars; for Smith, two thousand nine hundred dollars; for Armstrong, two thousand nine hundred dollars; and for Millis himself, eight thousand seven hundred dollars; making twenty-six thousand and one hundred dollars; that he paid to Beardsley, six thousand dollars; to Morris, five thousand five hundred dollars; to Kellam, two thousand nine hundred dollars; to Peck, twelve thousand dollars; to complainant, three hundred dollars; being a total of fifty-two thousand eight hundred dollars, paid over to shareholders. He also found that when Voorheis received this money the company owed him nine hundred and sixteen dollars and nine cents, and were otherwise indebted, as near as could be ascertained, to the amount of one hundred and seventy six dollars and fifty-three cents; that after deducting what was due him for services, Voorheis had in his hands eight thousand two hundred and eighty-three dollars and ninety-one cents, besides the oil stock in Heydrick & Brothers' Oil Company. The commissioner then stated the sum each shareholder was entitled to on the 22d of July, 1865, the over-payments and deficiencies in sums paid, the interest on the different sums, and the rectifications in the distribution which the principles of the decree required.

No objections appear to have been taken before the commissioner to the draft or scheme of his report in any particular, and no exceptions appear to have been filed or suggested to to the final report in the court below. Neither was there any motion to set it aside or refer it back. If not incorrect or inconsistent upon its face it was entitled to great weight. The defendants, if dissatisfied with it, should have excepted or taken some other action appropriate to the objection: Rule 79; *Suydam* v. *Dequindre*, Walk. Ch. 23; *Dean* v. *Emerson*, 102 Mass. 480; *Tyler* v. *Simmons*, 6 Paige, 127; *Daubeny*

v. *Coghlan*, 12 Sim. 507; *Morgan* v. *Evans*, 3 Clk. & Fin. 159, and Am. notes; *Mason* v. *Crosby*, 3 Wood. & M. 258; *Story* v. *Livingston*, 13 Pet. 359, 375; *Harding* v. *Handy*, 11 Wheat. 103, 126. The general rule is that the report of a master, or commissioner acting as master, is received as true when no exception is taken.

The report standing confirmed under the rule, the case came on on the equity reserved, and for further directions, on the 15th of March, 1873, when the court made a final decree. And it was adjudged that sixty-two thousand dollars, less the debts of the company, found to be one thousand ninety-three dollars and sixty-two cents, should be divided among the holders of the twenty-one shares, including complainant, according to the amounts held by them respectively, and according to the detailed statement on that subject in the report, and making two thousand nine hundred dollars and thirty cents as the share of complainant; that such sum should be paid to him with interest from July 22, 1865, which would give to him, at the date of the report, three thousand nine hundred and thirty-five dollars and twelve cents as his share of the fund, principal and interest; that Peck had received three thousand two hundred and ninety-nine dollars and ten cents in excess of his share, and that within sixty days from the date of the decree he should pay into court such excess, with interest from July 22, 1865; that Beardsley had received one hundred and ninety-nine dollars and forty cents too much and should refund in like manner; that if such sums, or enough thereof to equal the amount decreed to complainant, should be got into court, the sum going to complainant should be paid to him thereout, and the balance to Voorheis to cover the deficiency of his share; that in the event of a failure to get from Peck and Beardsley enough to pay complainant pursuant to the decree, Voorheis should pay him his quota within the ten days next succeeding the end of the sixty days given them for payment by the decree; that it not appearing that the four thousand shares of oil stock, obtained and held by Voorheis, possessed any intrinsic value, he must place it in court to await further directions. It was also adjudged that complainant should recover costs against Beardsley, Voorheis, Millis, Andrews, Peck, Morris, Armstrong, Smith, Spear and Kellam, and that the

decree might be enforced by executions. Without pretending to exactness we have here given a substantial summary of the commissioners' report and of the final decree.

The court seems to have adopted the theory that the right of Heydrick in the property owned by or held for the company was not in community with the rights of the other associates, and that in the ultimate disposition which was made, no change was worked in respect to his holding, or the nature of it, if he still continued a formal proprietor, and that the change actually produced only comprehended the property rights represented by the twenty-one Michigan proprietors. Now it is totally unimportant in regard to the result whether this view is embraced, or whether we adopt the construction before suggested and which appears to me to be authorized, that the arrangement in Pennsylvania was meant to change the status of the entire property of the "Wolverine Oil Company," and place its tangible estate under a different control; that the arrangement carried out by or through Heydrick for a sale; divested the Wolverine Oil Company of the substance theretofore represented by shares, and that Heydrick's holding for the company then ceased, and if he continued to hold for anybody besides himself, it was for other parties. The question, however, as before intimated, is without practical importance, and what is now advanced upon it is to be regarded as simply the impression of one member of the court.

We do not think it needful to discuss in detail the various objections which were pressed on our attention at the hearing, because after a patient examination of the record we discover no substantial fault in the decree. After this inspection, we find that the material grounds of the criticism of the defendants are removed by the application of principles now well settled. It appears to us very clear that the true controversy was one for equitable cognizance. See authorities before cited, also *Kelsey* v. *Hobby*, 16 Pet. 269. We also think it clearly established, that the Voorheis sale was not a mere transfer of individual stockholding rights of certificates held as the evidence that the holders were entitled to interests in the general stock, and which certificates were capable of being transferred without lessening or increasing the prop-

erty of the company, but it was a final cession of the ultimate fund or property of the company of that very property which the shares represented.

That the legal title stood in a third person was of no consequence. The property was in equity that of the company, and no one questioned the right of the company. *Hoxie* v. *Carr*, 1 Sum. 173; 2 Bouvier Inst. p. 94, par. 1457. If a quantity of oil had been drawn from a company well it must have belonged to the company, and ultimately to the shareholders, according to their respective stockholding rights. The same must be true of the well itself, and of the other property. There were no several rights in the common estate. They were all joint. No set of shareholders were entitled to any separate portion. Each had an undivided interest in whatever belonged to the company, and this could not be altered by turning the common property into cash. Such a step might be one toward a state of things to favor a division, but in itself it could operate no further than as a change in the form of the company property: *Clagett* v. *Kilbourne*, and other cases.

It is extremely clear that Heydrick, who held all the shares not owned in Oakland county, had no interest in the fund produced by the sale. He never claimed to have any, and the defendants do not suggest that he was entitled to participate in it. However his exclusion is accounted for, it is a fact insisted upon virtually on all sides, and the consequence is that twenty-one shareholders only are left to partake of the proceeds of the sale of the oil property.

By the constitution of the company, the ownership of a certificate carried with it an undivided interest in all company property, whether such property should stand in the name of the company or in some other name, and this special consequence of the fact of ownership of a certificate was not designed to be affected, and was not affected by mere non-subscription of the articles. No other construction can be placed on them. Adams' Eq., 242; *Harper* v. *Raymond*, 3 Bos. 29.

The complainant owned a certificate. The fact stands admitted by the company records. A mass, certainly, if not the whole of the property in which he had an undivided interest as such owner, was converted into money by the assent of

every one of the shareholders of the whole thirty shares. The transaction thus assented to, and which resulted in the conversion, was meant to extinguish, and did extinguish, the right of the shares still controlled by Heydrick to participation in the new fund produced by the sale to him. There were nine of these shares then controlled by Heydrick. Twenty-one shares, with complainant's, were unexcluded. But it is claimed that twenty of these are entitled to the whole fund, to the exclusion of the twenty-first share owned by complainant. We do not see how any such division can be forced upon him. On the contrary, we think he was legally and equitably entitled to a ratable share of the fund. 2 Bouvier's Inst., pages 130, 131, 132, 133, 135, 136; Story, Eq. J., §§ 1243, 1255, 1256.

We have not stopped to dilate on the company proceedings in recognizing him whenever burdens were to be borne, and in treating him as a legal member, even when, so far at least as appears, there was no company property to be represented by certificates other than the fund produced by Voorheis' sale, and still maintaining that he had no interest whatever in the fund.

The decree of the court below should be affirmed with such variations in regard to time as the delay caused by the appeal has made proper, and the complainant should recover his costs in this court, of the defendants who appealed. The cause should be remanded for the execution of the decree.

CAMPBELL and COOLEY, JJ., concurred.
CHRISTIANCY, J., did not sit in this case.

JUDGE ET AL. v. BRASWELL ET AL.

(13 Bush, 67. Court of Appeals of Kentucky, 1877.)

Findings of court on legal issue. When there is no issue properly cognizable in equity, findings on the facts by the court below must be treated the same as if the same facts had been found by a jury.

[1] **Private arrangement between partners.** The rule that third parties are not affected by private agreement existing between partners without

[1] See *Nolan* v. *Lovelock*, 9 M. R. 360.

notice thereof, rests upon the custom of merchants alone, and has no application to non-commercial partnerships.

Proof of authority of member to contract. In non-commercial partnership one who seeks to hold the firm bound upon a contract made by a single member must be able to show either express authority or that such is the custom or usage of that particular branch of business in which the firm is engaged; or such facts as will warrant the implication of authority from his copartners.

Burden of proof of authority to bind firm. In such case the burden of proof as to authority to bind the firm, lies affirmatively upon the plaintiff to show such authority.

Mining, a non-commercial partnership. The above rules applied to a company organized to buy and work mines, as belonging to the class of non-commercial partnerships.

MUIR, BIJUR & DAVIE, A. DUVALL and EDWARDS & SEYMOUR, for appellants.

L. D. HUSBANDS and A. J. JAMES, for appellees.

JUDGE COFER delivered the opinion of the court.

February 12, 1873, J. D. Morris, E. C. Machen, R. E. Cross, N. B. Peck and Philip Judge entered into a written agreement, wherein it was recited that Morris and Machen had, by leases from the owners thereof, secured the right to enter upon divers tracts of land, situated in Lyon county, for the purpose of prospecting for and mining iron ore and other minerals, and that there was much other land in the same county which could be leased upon similar terms. The writing then proceeds:

"Said Morris & Machen, R. E. Cross, N. B. Peck and Philip Judge have and do hereby form a copartnership, under the firm name of Morris, Machen & Co., for the purpose of engaging in said mining business upon said lands, or upon any other lands which they may procure for that purpose. Said business to include the getting out of iron ore or other mineral substances and coal from any lands aforesaid, or which said firm may secure, and the right to develop same and sell the ore and coal, etc., *or to sell* the rights, privileges, or leases aforesaid, *or any lands, the title to which said firm may secure.* Said Morris & Machen agree to put all of their rights, title, claim, or privileges which they have in, of, or to any of said lands into

said firm of Morris, Machen & Co., and to secure to said firm all the right, title, and interest or claim they have in or to the same, or which they may acquire by proper deed or deeds of conveyance, duly executed, acknowledged and delivered, to said firm. Each of said partners agrees to share equally in all the profits or losses of said enterprise. Said partnership to continue during the will of the partners, and said Cross, Peck, and Judge agree to put into said firm a sum of money, as so much capital advanced by them to said firm, for the purpose of building side tracks from said E. & P. railroad to the said mining lands, and so much as may be necessary, not exceeding $3,000. Said Morris & Machen have actually expended $680 in said enterprise to secure their rights aforesaid, and they shall each be entitled to a credit of $340, as so much capital advanced to said firm; said sum so expended by them having been spent for the benefit of said enterprise, *and said enterprise is to embrace the purchase of the title to any coal or mining lands in fee*, and the leasing of same, as said firm may determine; but no debt shall be contracted by said firm, or by any member thereof on account of said firm, without the consent of said partners; and if said Morris & Machen or any one of said partners, or either of them, shall lease or purchase any mining or coal lands on or near said railroad, he or they shall convey the same to said firm at cost price, if said firm so elect."

March 29, 1873, E C. Machen purchased in the name of Morris, Machen & Co. a tract of two hundred acres of land of the appellees, H. L. Machen and N. T. Braswell, at the price of $6,000, and a tract of two hundred acres of N. T. Braswell, at the price of $2,000, and accepted deeds therefor, which, on the 31st of March, were lodged in the clerk's office of the Lyon County Court for record.

April 23d E. C. Machen drew, in the name of Morris, Machen & Co., upon Philip Judge, in favor of Machen & Braswell, for $6,000, and in favor of Braswell for $2,000, in payment for the land. Judge refused to accept or pay the bills, and these suits were brought thereon against Morris, Machen & Co. Cross, Peck and Judge denied the right of E. C. Machen to purchase lands for the firm; averred that they had not been consulted, and had not consented to either of the purchases; that such purchases were frauds upon them, and had been

made pursuant to a fraudulent conspiracy between E. C. Machen and H. L. Machen and Braswell; pleaded *non est factum* to the bills, and renounced any and all claims to the lands. They also set up the article of partnership, and alleged that at the time of making the sales both H. L. Machen and Braswell knew that E. C. Machen had no authority to make the purchases.

By consent of the parties, the suits were transferred to equity and consolidated, and on final hearing judgments were rendered for the plaintiffs and from those judgments Cross, Peck and Judge prosecute this appeal.

There was no issue in either case that was properly cognizable in equity, and we must treat the finding of the circuit court on the same facts as if the same facts had been found by a jury. The evidence was, when viewed most favorably to appellants, conflicting on the question of fraud, and also upon the question whether Braswell had notice of the limitation in the articles of partnership upon the power of the members of the firm to contract debts without the consent of all the members. There was no evidence conducing to prove that H. L. Machen had any such notice.

We therefore assume that there was no fraud, and that neither of the appellees had any notice of the restriction in the articles of partnership upon the power of the individual partners to create debts against the firm, and proceed to decide the case upon the single question whether, in view of the terms of the partnership and the law applicable thereto, the appellants are liable for the price of the land. And here we ought to remark that the facts are so stated in the petitions that the right of the appellees to recover does not depend alone upon the authority of E. C. Machen to draw bills in the name of the firm, but upon the question whether Machen had power to purchase the land and bind the partnership for the price; and we ought also to remark, that there was no evidence conducing to prove that the appellants ever ratified the purchases, or either of them. The partnership articles provide that the partnership is formed "for the purpose of engaging in said mining business upon said lands (*i. e.*, the lands already leased by Morris & Machen), or upon any other lands which they (Morris, Machen & Co.) may procure for that purpose; said

business to include the getting out of iron ore or other mineral substances and coal from the lands aforesaid, or which said firm may secure, and the right to develop the same and sell the oar and coal, etc., or to sell the rights, privileges or leases aforesaid, *or any land the title to which said firm may secure.*" And again: "*And said enterprise is to embrace the purchase of the title to any coal or mining lands in fee,* and the leasing of the same, as said firm may determine."

It seems to us that this language is clear and explicit, and that the purchase and sale of lands were within the scope of the partnership. But the articles are equally explicit that no member of the firm, and no number of them less than the whole, has authority to buy lands for the firm. It is contended, however, that the purchase of lands being within the scope of the partnership, each member had implied authority to make purchases for the firm, and that whatever may have been the rights and duties of the partners *inter sese*, and the express limitation upon their power contained in the written agreement between them, third persons dealing with a single partner, without notice of the private agreement between them, can not be affected by it.

This is undoubtedly true as to commercial partnerships; but it is a rule of the law merchant which has been adopted into the common law, and rests for its support upon the custom of merchants alone, and has no application to non-commercial partnerships.

Mr. Collyer says: "The law of partnership, as administered in England, rests on a foundation composed of three materials: the common law, the law of merchants, and the Roman law;" and he traces the power of one partner to bind his copartners by a bill of exchange to the law merchant. Again he says, "The general principle which governs all partnerships in trade is this: that each individual partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern, and consequently, that he is liable to the performance of all such contracts in the same manner as if entered into personally by himself." Collyer on Partnership, 103.

But the power of one partner thus to bind his copartners rests alone upon the usage of merchants, and does not amount

to a rule of law in any other than commercial partnerships. Story on Partnership, Sec. 126.

In non-commercial partnerships one who seeks to hold the firm bound upon a contract made by a single member must be able to show either express authority, or that such is the custom and usage of that particular branch of business in which the firm is engaged, or such facts as will warrant the conclusion that the partner had been invested by his copartners with the requisite authority, the distinction being that in commercial partnerships the extent of a partner's power to bind the firm is a question of law, while the power of a partner in a non-commercial firm to bind his copartners is a question of fact. Thus the business of a commercial partnership being ascertained, and the nature of the contract made by a single member, and the circumstances attending it being known, the court may generally determine as matter of law whether the contract was within the scope of the implied powers of a partner. Not so, however, in reference to a contract made by a member of a non-commercial partnership. A partner in such a partnership does not generally possess power to bind the firm, and consequently the extent of his powers is not fixed by the rules of law, but each case is left to be decided upon its particular facts; and in all such cases, in order to make out the liability of the firm, it ought to be made out affirmatively by the plaintiff that the partner had power to make the contract in question: *Dickinson* v. *Valpy*, 10 B. & C. 128; *Levy* v. *Pyne & Richards*, 41 E. C. L. 249; *Smith* v. *Sloan*, 37 Wis. 289.

In the cases at bar the authority of the partner making the contract is not shown. The partnership articles show that no such authority was thereby conferred; no evidence was offered to prove that such authority had been otherwise delegated, or that it was usual in such partnerships for one partner to buy land in the name of the firm, or that the existence of such authority was necessary in order to carry on the business for which the partnership was created, and we have seen that no such power can be implied from the mere existence of the partnership.

We are therefore of the opinion that the court erred in rendering judgment against the appellants, and the judgment as to them is *reversed*, and the cause is remanded with directions to dismiss the petition.

HIRBOUR v. REEDING ET AL.

(3 Montana, 13. Supreme Court, 1877.)

[1] **Oral agreement for locating lodes—Statute of Frauds.** If three persons enter into an oral agreement of copartnership in the business of prospecting and discovering quartz claims, and of acquiring title thereto for the mutual benefit of the copartners, such contract is not within the Statute of Frauds.

Prospector holding title in his own name for associates. If the legal title to a lode discovered and located in pursuance of a prospecting contract is taken in the name of two of the partners, equity will treat them as trustees for the other partner.

Partners buying in adverse claim and refusing benefit thereof to associate. The three associates in a prospecting adventure discovered the Silver Girdle lode. It was recorded in the names of two of them. Afterward certain strangers located over the same ground the Burlington lode. These strangers conveyed the conflict to the same parties in whose name was the first location. *Held*, that the party for whom one third of the original title was held by his associates was entitled to his share of the benefit of the purchase.

Appeal from Second District, Deer Lodge County.

KNOWLES, J., sustained the demurrer to the complaint. Hirbour declined to amend the same, and judgment was entered for Reeding and Gassert, the defendants.

SHARP & NAPTON, for appellant.

W. W. DIXON, for respondents.

BLAKE, J.

The action of the court below in sustaining the demurrer of the respondents to the complaint of the appellant is before

[1] *Southmayd* v. *Southmayd*, 4 Mont. 100.
[2] *Lakin* v. *Sierra Co.*, 25 Fed. 337; *Bank* v. *Bissell*, 11 M. R. 546.

us for review. The following facts appear in the complaint, and must be taken as true upon this hearing. Hirbour, the appellant, and Reeding and Gassert, the respondents, entered into a verbal contract of copartnership in April, 1873, at Rocker City in this Territory, "for the purpose of prospecting for, locating, recording, pre-empting, developing and mining quartz lodes and other mining property in Montana Territory." Each party was to have an undivided third interest in said lodes and property, and pay for one third of the labor and other expenses incurred in carrying on the business of the copartnership. Under this contract the Silver Girdle lode was discovered by the parties, but it was recorded in the names of the respondents by them April 23, 1873, when it should have been recorded in the names of the copartners. All the parties "worked upon and mined" this lode in July, 1875, and developed and "displayed great value" in the property. "Said work and labor were done and performed" by the parties "as copartners in obedience to, and under and by virtue of, said contract of copartnership." After the lode had been recorded, certain persons, Young and Rouderbush, located and pre-empted under the name of the Burlington lode a part of the Silver Girdle lode. The conflict respecting the titles to the property was compromised, and Young and Rouderbush conveyed by a deed to the respondents July 29, 1875, thirteen hundred and fifty feet of the Burlington lode, which was included within the boundaries of the Silver Girdle lode. The respondents refuse to give the appellant an interest in the property, and have extracted therefrom a large quantity of valuable ore. The copartnership has not been dissolved, and there has been no accounting between the parties.

The respondents demurred to the complaint upon the following grounds:

That the contract of copartnership was within the Statute of Frauds of this Territory and void, and that the complaint was ambiguous in failing to state the amount of the work which was done by the appellant upon the lode, or its value, or the time when it was done. The court below sustained the demurrer, and judgment was afterward entered for the respondents.

The respondents claim that the allegation of the complaint respecting the amount of the work performed by the appellant on the property is ambiguous, but we think that it should be deemed an averment that the appellant performed his part of the conditions of the contract of copartnership. When this allegation is controverted by the respondents, the appellant must establish on the trial "the facts showing such performance." Civ. Pr. Act, § 68. Therefore the examination of one question will enable us to determine this appeal. If the contract of copartnership is valid we are of the opinion that the complaint contains the allegations that are necessary to empower the court to enter a decree requiring the respondents to convey to the appellant his interest in the property in controversy. Is this contract within the Statute of Frauds of this Territory? The following sections of the act relating to conveyances and contracts are pertinent to this inquiry:

"No estate or interest in lands other than for leases for a term not exceeding one year, or any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." Cod. Sts. 393, § 6. "The term 'lands,' as used in this act, shall be construed as co-extensive in meaning with land, tenements, hereditaments and possessory land claims to public lands; and the terms 'estate' and 'interest' in lands shall be construed to embrace every estate and interest, present and future, vested and contingent, in lands as above defined." Cod. Sts. 394, § 22; 389, § 1.

It does not appear that the respondents have acquired the title of the United States to the property. Their interest in the lode may be lost or forfeited by abandonment, or a failure to comply with the laws of the mining district, the Territory or the United States. Counsel for both parties concede, what we consider a sound proposition, that the lode in dispute is real estate. *Melton* v. *Lambard*, 51 Cal. 258. We must apply to the contract set forth in the complaint the legal principles that govern copartnerships for the purchase and improvement of real property.

A partnership may be formed without any written articles between the parties. "After some question it seems to be settled that there may be a partnership for the buying and selling of land." Pars. on Part., 37, n. *f*. According to the weight of the authorities, which are conflicting upon the question, the contracts of such a partnership need not be reduced to writing to make it valid. Pars. on Part., 7, n. *d*. We do not intend to review the cases in which this subject has been examined, but will refer to a number of the most recent decisions which we have read.

The Supreme Court of Indiana holds, in *Holmes* v. *McCray*, 51 Ind. 358, that a parol agreement for a partnership for the purpose of dealing in lands is not within the Statute of Frauds. Chief Justice Biddle, in the opinion, says: "As between the partnership and its vendors or vendees in the sale or purchase of lands, the statute in all cases would operate; but as between the partners themselves, when they are neither vendors nor vendees of one another, we can not see how the statute can affect their agreements."

In New York, the same views are announced in *Chester* v. *Dickerson*, 54 N. Y. 1, and *Fairchild* v. *Fairchild*, 64 Id. 471. Chief Justice Wade in his concurring opinion quotes from the opinion of the court in *Chester* v. *Dickerson*, *supra*, and this reference is therefore sufficient. The same matter is considered in *Traphagen* v. *Burt*, 67 N. Y. 30, and the court comments on the case of *Levy* v. *Brush*, 45 Id. 589, which is relied on by the respondents, and says: "In the case cited (*Levy* v. *Brush*, *supra*), the plaintiff had done no act of performance, advanced no money, nor parted with anything under the contract, nor had the land been accepted, possessed and treated as joint property, nor improvements made upon the same accordingly, and the contract regarded as carried into effect. * * * Where a party has partly performed or parted with valuable property upon the faith of the contract, equity will not allow another party to retain property obtained upon the faith of a verbal contract to consummate a fraud by retaining the property and refusing to perform the contract."

These rules have been applied to the settlement of questions arising concerning quartz lodes. The case of *Murley*

v. *Ennis*, 2 Col. 300, is directly in point. Mr. Justice Wells says in the opinion: "If two or more go into the public domain together to search and explore for mines, with the agreement to occupy and develop such discoveries as may be made for the joint benefit, and such discovery, development and joint occupation follow, it is clear that, while each explorer becomes invested with his due share and estate in the premises, no provision of the Statute of Frauds is violated. * * * Such contract of association is merely the creation of an agency in each of those contracting, and is no more a violation of law than a contract of partnership or association in any lawful calling."

In *Welland* v. *Huber*, 8 Nev. 203, three persons and Huber, in December, 1871, entered into a verbal agreement to prospect for and locate mines. All the parties were to be equal owners. In 1872 Huber located the Huber lode, 1,000 feet in length, and recorded in the name of each partner 200 feet and in his own name 400 feet. In the decision Mr Justice Belknap says: "If Huber located the 400 feet in his own name in pursuance of the alleged partnership, he did so under an implied promise to convey to the complainants their interest in it upon request. The complainants at once acquired a right to a specific performance, and that right could be enforced in equity without a previous request."

In *Gore* v. *McBrayer*, 18 Cal. 582, Gore, McBrayer and others verbally agreed to prospect for quartz. The court held that the Statute of Frauds, which requires an instrument in writing to create an interest in land, does not apply to the taking up of mining claims, and that a writing is not necessary to vest or divest title on locating mines. In *Settembre* v. *Putnam*, 30 Cal. 490, it is decided that, if mining partners, under a verbal agreement, claim and develop a lode upon the land of another, and authorize one of their number to buy the same for the benefit of all, and he procures a deed in his own name, he holds the legal title of the interests of his partners in trust for them.

After examining these cases we conclude that the contract of copartnership made by the appellant and respondents is valid and can be enforced. The name of the property in controversy, which may be called the Silver Girdle lode, or

the Burlington lode, is immaterial. It was acquired and developed by the labor of the appellant and respondents under the contract, and is the property of the parties to this action. The transaction between the respondents and Young and Rouderbush, by which the same estate under another name was conveyed to the respondents, does not affect the rights of the appellant to his interest. The legal title is vested in the respondents, but equity will treat them as trustees for all the partners: *Fairchild* v. *Fairchild*, *supra;* Pars. on Part., 363; Story on Part., § 92; Bainbridge on Mines (3d Ed.), 395; *Dupuy* v. *Leavenworth*, 17 Cal. 262; *Miller* v. *Ball*, 64 N. Y. 286.

The demurrer to the complaint should have been overruled.

WADE, C. J., concurring.

The question presented by this record is, whether or not if two or more persons enter into a verbal agreement of copartnership in the b siness of prospecting for and discovering quartz c'aims, and when discovered, to acquire title thereto for the mutual benefit of the copartners, such contract, not being in writing, is within the Statute of Frauds and void.

Congress has granted to the citizens of the United States, and to those who have declared their intention to become such, the privilege of entering upon and exploring the public domain, for the purpose of discovering valuable mineral deposits therein. The business, therefore, of searching or prospecting for quartz lodes or placers, is entirely legitimate, largely engaged in in this Territory, and may be conducted either individually or in partnership. All kinds of property may be held in partnership. Quartz claims, by our statute, are made real estate, and there can be no question that it is entirely legitimate for parties to enter into a partnership for the purpose of trading, dealing and speculating in real estate: *Clagett* v. *Kilbourne*, 1 Black, 346; *Fall River W. Co.* v. *Borden*, 10 Cush. 458; Pars. on Part., 37; 3 Kent, 24, 28. The inquiry before us, however, has to do with the proposition as to how the existence of such a partnership shall be evidenced and established. Our statute has been cited by Mr. Justice Blake, *ante*, 516.

Did this verbal agreement of copartnership create, grant or

declare any interest in real estate at the time it was entered into? Evidently not, for, at that time, as to this copartnership, there was no real estate in existence; neither of the partners then owned or had any interest in a quartz claim; such claim was yet to be searched for and found. There was nothing upon which the agreement could operate. It created and declared the title to nothing at all. A quartz claim is not real estate until discovered and located, and a verbal agreement concerning an undiscovered and unknown claim is not and can not be an agreement creating or disposing of an interest in real estate, and if not, such agreement is not within the statute.

This agreement contemplated that the parties would search for and find quartz claims, and when found, that they would comply with the provisions of the act of Congress, whereby title could be acquired. But the agreement in and of itself did not create or declare a title to any property whatever. If by this agreement the parties had attempted to make a parol or verbal conveyance of land, or any interest therein, they would have utterly failed, for at the time the agreement was made they had no lands to convey. Evidently, then, it was not the object or purpose of this agreement to create, grant or declare any interest in real estate. How are the titles to quartz claims acquired, created or declared? First, a valuable mineral deposit must be found; second, it must be distinctly marked and located; third, $500 worth of work must have been performed upon the claim before a patent can be granted; fourth, after finding the lead, locating it, and performing the necessary amount of labor, an application may be filed in the local land office for a patent, and after publication of notice for sixty days, as the law requires, and no adverse claim being interposed, a patent may issue. But at the time of this agreement none of these things had been accomplished, no lead had been found, and it seems, therefore, reasonable to follow that the agreement did not attempt to create, grant, assign or declare any interest in real estate, and is not within the Statute of Frauds.

We think the following authorities conclusively determine the proposition that a partnership may exist in reference to acquiring title to the sale and ownership of real estate, and that such partnership may be created by parol agreement.

In *Dale* v. *Hamilton*, 5 Hare, 369, the bill of the plaintiff alleged the parol agreement of copartnership with the defendants for the purpose of speculating in lands. The vice-chancellor, in deciding the case, said: "When the proposition was first advanced by the plaintiff, I confess it appeared to me that to admit the argument to the extent contended for, would be virtually to repeal the Statute of Frauds, or nearly so." But upon a further examination of the authorities he held that the plaintiff might first prove, by parol, the existence of the partnership as an independent fact, and that being established, he might then show, by the same evidence, his interest in the lands, considered as the substratum or stock of the partnership. Pars. on Part., 7, n. *d*.

In *Smith* v. *Tarlton*, 2 Barb. Ch. 336, the bill stated that by the copartnership agreement, which was by parol, the complainant and the defendants entered into a partnership which was to continue three years, the business of which was to purchase a water privilege and site for a foundry in the village of Plattsburgh, and to erect an iron foundry or furnace thereon, and to carry on the business of manufacturing iron castings, etc., and that each of the copartners was to contribute a certain amount of funds to the capital of the firm; that the parties all contributed money to the capital, and a site was procured and a foundry erected thereon by the copartners, but that the title to the land was taken in the name of the defendants only. The chancellor in the course of his decision, said: "I can not see that there is any validity in either of the objections raised by the counsel of the defendants to the parol agreement of copartnership. This was not, as the counsel supposes, an agreement which was not to be performed within one year, so as to require it to be in writing under the Statute of Frauds; but it was the formation of an immediate partnership between the parties, which partnership was to continue three years unless sooner dissolved by the consent of such parties. In this State no written articles are necessary to constitute a copartnership which is to take effect immediately, although a written agreement might be necessary to bind the parties to enter into a future copartnership to commence after the expiration of a year. But even where there was a parol agreement to enter into a copartner-

ship at a future day, and specifying the terms of such copartnership, I apprehend that, if the parties went into copartnership at the prescribed time without agreeing upon any new terms, the former parol agreement would be presumed to constitute the terms on which such partnership was entered into and carried on."

"Nor is the objection well taken that this partnership was invalid because a part of the business of the firm was to purchase real estate as a site for the foundry, and to erect a building thereon for the purpose of making iron castings, etc. The case of *Henderson* v. *Hudson*, 1 Munf. 510, referred to by the defendant's counsel, was not a case of partnership, or of land purchased with partnership funds for the use of the copartnership firm. It was merely an attempt to create a trust by parol in lands purchased by an individual in his own name and with his own funds. But real estate purchased with partnership funds for the use of the firm, although the legal title is in the member or members of the firm in whose name the conveyance is taken, is in equity considered as the property of the firm for the payment of its debts and for the purpose of adjusting the equitable claims of the copartners as between themselves." The motion to dissolve the injunction for the reason that the bill did not state a cause of action was therefore denied.

In the case of *Chester* v. *Dickerson*, 54 N. Y. 1, the question was again decided. Counsel in their briefs in that case made the point that the lower court erred in holding that the partnership of the de endants in the lands in question could exist by parol, and cited authorities to support the proposition, to which the adverse counsel replied, citing authorities, and the court was called upon directly to decide the question, and by Earl, J., the court say: "It can not be questioned that two or more persons may become partners in buying and selling land. There is nothing in the nature or essence of a partnership which requires that it should be confined to ordinary trade and commerce, or to dealings in personal property. Story on Part., §§ 82, 83; Collyer on Part., §§ 3, 51; *Dudley* v. *Littlefield*, 21 Me. 418; *Sage* v. *Sherman*, 2 N. Y. 417; *Mead* v. *Shepard*, 54 Barb. 474; *Pendleton* v. *Wambersie*, 4 Cranch, 73; *Thompson* v. *Bowman*, 6 Wall. 316; *Hoxie* v.

Carr, 1 Sumner, 173. Kent says: 'A partnership is a contract of two or more persons to place their money, effects, labor and skill, or some one or all of them, in lawful commerce or business, and to divide the profit and share the loss in certain proportions, and that it is not essential to a legal partnership that it be confined to commercial business. It may exist between attorneys, conveyancers, mechanics, owners of a line of stage coaches, artisans or farmers, as well as between merchants and bankers' (3 Kent's Com. 24, 28), and why may it not exist between dealers and speculators in real estate?"

"But as it is claimed that the partnership in this case existed by parol before the execution of the written agreement, dated November 28, 1864, it is necessary to inquire whether a partnership in reference to lands can be formed and proved by parol. Upon this question there is considerable conflict in the authorities. On the one hand it is claimed that a parol agreement for such a partnership would be within the Statute of Frauds, which provides that no estate or interest in lands shall be created, assigned or declared unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning, or declaring the same (the New York statute being in this regard the same as our own), and to this effect is the case of *Smith* v. *Burnham*, 3 Sumner, 345. On the other hand it is claimed that such an agreement is not affected by the Statute of Frauds, for that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of, and administer upon all the partnership property, whether it be real or personal, and in such cases will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the Statute of Frauds, and to this effect are the following authorities: *Dale* v. *Hamilton*, 5 Hare, 369; *Essex* v. *Essex*, 20 Beav. 449; *Bunnel* v. *Taintor*, 4 Conn. 568. A full discussion of the question is found in *Dale* v. *Hamilton*, and the reasoning and review of the cases there by Vice-Chancellor Wagram are quite satisfactory The general doctrine is there laid down

"that a partnership agreement between A and B that they shall be jointly interested in a speculation for buying, improving for sale and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith within the Statute of Frauds, and such an agreement being proved, A or B may establish his interest in the land, the subject of the partnership, without such interest being evidenced by any such writing." I am inclined to think this doctrine to be founded upon the best reason and the best authority. But whether it is or not is not very important to decide in this case. Most of the conflict in the authorities has arisen in controversies about the title to the real estate after the dissolution of the partnership or the death of one of the partners. But suppose two persons, by parol agreement, enter into a partnership to speculate in lands; how do they come in conflict with the Statute of Frauds? No estate or interest in land has been granted, assigned or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. (As in the case at bar when the agreement was made no quartz claims had been discovered, nine were owned by the firm, and neither party attempted to assign or convey to the other.) The contract is a valid one, and in pursuance of this agreement they go on and buy, improve and sell lands (as in the case we are considering, in pursuance of the agreement the parties go on and discover and locate quartz claims). While they are doing this they do not act as partners and bear a partnership relation to each other. Within the meaning of the statute in such case, neither conveys or assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in lands; it is simply aimed at the creation or conveyance of an estate in lands without writing. If there was a parol agreement in this case before the written one, it was just like the one embodied in the writing, to wit, a partnership to purchase, lease and take the refusals of land and then sell, lease or work them for the joint benefit of the parties. This is not a controversy about the title to any of the lands taken or owned by the partners, but it simply relates to the conduct of the defendants while they

were acting as partners, and in such a case the Statute of Frauds certainly can present no obstacle to relief." The court then go on to find as a matter of fact from the evidence, that there was a partnership existing between the parties; that such partnership was evidenced by a parol agreement; that the same was a valid partnership, although formed for the purpose of buying, selling and speculating in lands, and adjust the rights of the parties accordingly.

The case of *Traphagen* v. *Burt*, 67 N. Y. 30, is to the same effect. In that case the plaintiff and defendant made an oral agreement to engage in the business of buying and selling farms for their mutual benefit and at their joint risk. Under this agreement defendant bought two farms and took the deeds to himself and plaintiff jointly. He afterward purchased the farm in question, but took the deed to himself alone, refusing to admit the plaintiff to any participation in the ownership, the facts being very similar to the case in hand, except in the case we are considering the plaintiff discovered the quartz lead and the defendants obtained the title thereto, and refused to admit the plaintiff to any participation in the ownership thereof. In deciding the case, which was an action brought to establish a trust in the defendant, Burt, in favor of the plaintiff, for one undivided half of the farm in question, the court say: "It is established by abundant authority in this State that a partnership may exist in reference to the purchase, sale and ownership of lands, and that it may be created by a parol agreement."

Upon these authorities and the reasons therefor, I rest the opinion that the complaint in this action contained a cause of action, and that the demurrer thereto should have been overruled.

KNOWLES, J., filed a dissenting opinion.

DUFFIELD ET AL. v. BRAINERD ET AL.

(45 Connecticut, 424. Supreme Court of Errors, 1878.)

[1] **Quarry works prosecuted—Successive parties in interest—Partnership continued by acquiescence of heirs—Necessity of demand to dissolve before suit.** Sundry persons, tenants in common of quarries, formed a partnership in 1850, to work the same, which partnership was carried on at a profit without dissolution, although several changes by death and succession had occurred, until 1872, when one of the partners died, and her devisees, after demand made, brought this action for an account. The profits of the concern had been largely invested in buying other quarry lands. The petition alleged that by reason of the deaths of members of the partnership and the confusion of interest they could not say whether the partnership had been dissolved, but that they believed and therefore averred that it was dissolved.

Held, 1. That the partnership was to be considered as subsisting by the consent of the successors in interest of the members deceased, and as still subsisting.

2. That the averment above recited was not an averment that the partnership had been dissolved by a withdrawal of the assent under which it had been continued; and that the facts did not amount to a showing of a dissolution.

3. That a demand for an accounting and payment did not constitute a demand for dissolution.

4. That petitioners were not entitled to demand their shares in cash. They had assented to let the business proceed, and must stand to an accounting, including the losses.

5. That they were not in position to take a decree, until a supplemental bill should show a distinct election to dissolve with notice thereof and refusal to account upon such notice.

Bill in equity for a disclosure and account, the payment of moneys found due and the appointment of a receiver of partnership property; brought to the Superior Court in Middlesex county. The facts were found at great length by a committee and the case reserved for advice. The disposition made of the case by this court renders it unnecessary to state the facts more fully than they are given in the opinion. The principal points argued by the counsel become also, for the same reason, unimportant.

F. CHAMBERLIN and E. S. WHITE, for the petitioners.

[1] *Phillips* v. *Reeder*, 11 M. R. 420.

R. D. HUBBARD, R. G. PIKE, D. CHADWICK and S. L. WARNER, for different respondents.

PARDEE, J.

In 1850 Erastus Brainerd, Erastus Brainerd, Jr., Frederick Hall, Joseph Stancliff, Mary M. Brainerd and Ellen M. Duffield (the two latter by agent and trustee), entered into a written copartnership agreement for the purpose of carrying on the business of quarrying and selling stone, for such length of time as a majority in interest of the partners should request and demand. At this time they were the owners of cattle, tools, carts, etc., of the value of $50,000, and quarry lands of the value of $235,000, and this property constituted their capital stock, and was owned in the following proportions, viz.: Erastus Brainerd, five sixteenths; Erastus Brainerd, Jr., two sixteenths; Mary M. Brainerd and Ellen M. Duffield, five sixteenths; Frederick Hall, two sixteenths; Joseph Stancliff, two sixteenths. The said Mary M. Brainerd had an estate for life in an undivided interest in the real estate, as widow of Silas Brainerd, and the said Ellen M. Duffield, who was her daughter, had an estate in fee in the same interest, subject to her mother's life estate, and the interest in the copartnership held by them and representing this real estate was held by them in the same way. Frederick Hall died in 1867; Erastus Brainerd, in 1861; Joseph Stancliff, in 1870; Mary M. Brainerd, in 1872; Erastus Brainerd, Jr. and Ellen M. Duffield, now Ellen M. Pike, and daughter of said Mary, still survive. The petitioners are the children of Ellen M. Pike, joining with William J. Osborne, administrator upon the estate of the said Mary; the respondents are Erastus Brainerd, Jr., and the representatives of the several deceased partners.

Notwithstanding these successive deaths the copartnership business has been continued to the present time by the managers without interruption or change, and without objection on the part of the representatives or heirs of any deceased partner, except that the administrator upon the estate of Mary M. Brainerd called upon Erastus Brainerd, Jr., then and still the chief manager, for an account and payment of the money due to that estate, and in November, 1874, brought

this petition in equity. In it the petitioners allege, among other things, that the said Mary M. Brainerd was entitled during her life to five forty-eighths of all the rents and profits accruing from said business, and that by the terms of the copartnership these were to be divided; and that although these profits were in 1871 more than $97,000, in 1872 more than $120,000, in 1873 more than $78,000, and prior to 1871 were $3 0,000, yet the managers have refused to pay to the petitioners their proportionate share thereof, and have invested the same in the purchase of property not needed for the successful working of the quarries, and have not used them in the legitimate business of the partnership.

They also allege that by the death of sundry partners and other changes, and by the division and confusion of interests, they are unable to say whether the copartnership has been dissolved or not, but that they believe, and therefore say, that it has been dissolved and terminated.

They also pray that if it should appear that the copartnership has been dissolved, the court will order an account of its transactions during the time of Mary M. Brainerd's life, and that the respondents be directed to pay to the petitioners such sums as shall be due to her estate and to the said legatees, and that some proper person be appointed a receiver, with authority under the direction of the court to sell that part of the property which is within this jurisdiction, ascertain the value of that which is without, to collect the money due to the partnership, and hold the same subject to the order of the court.

After the death of any partner his representatives have joined with the surviving partners in premitting and requesting Erastus Brainerd, Jr., who has been the chief manager of the partnership from its organization to this present, to continue the business as that of a partnership in form and fact; no one of them declared a dissolution, or asked the court to enforce one; they severally accepted their respective proportions of profits specifically as dividends earned by a continuing partnership, and not as a percentage of assets returned after a final settlement of partnership affairs. And although the representatives of Mary M. Brainerd made a demand upon the chief manager for an account and for the amount due

the estate of said Mary M., and received for answer that he could not tell how to state such an account of what was due, they rested upon that answer; they interposed no objection to a continuance of the business by a partnership; they permitted Mr. Brainerd to believe, and act upon the belief, that they would not insist upon any rights other than those to which they would be legally entitled as partners; they suffered him to bear the weight of individual obligations to the extent of $128,000, for the protection of the property, knowing that they had given him reason to believe that they would only demand their share of what should remain after these obligations had been discharged, and after a final settlement of the business as that of a partnership continued to a time thereafter to be specifically fixed. As between themselves and Mr. Brainerd, they are to be held as having, in consideration of his individual advancements and continued services for the protection of their common interests, agreed with him to postpone the enforcement of their legal right to a dissolution as of the day of Mrs. Brainerd's death, to a day to be named by them in the future, and as having notified him that they had elected that he should conduct the business as that of an uninterrupted partnership, and to accept on such future day, of the assets which should then remain, such proportion as the law of partnership would give them. They are to be held as having agreed not to hold him solely accountable for all possible losses as a surviving partner wrongfully using and exposing their property against their will to the hazards of the partnership business. Having thus induced him to manage the business as one of continuing partnership and entitled themselves to the greater profits which might result from that relation, they should likewise share with him its risks and obligations until they shall give him distinct and precise notice that from and after a day to be named by them they reverse their previous election that the partnership should continue, and that from thenceforth they shall hold him accountable as a surviving partner wrongfully continuing the use of their share of the partnership property. From the service of such notice the general rule of law terminating a partnership upon the death of a member, the operation of which in this particular case has been restrained by the petitioners, will come into

action, and they will be entitled to the aid of a court of equity in enforcing it. From that date it will be the duty of the managers to close the business of the partnership as speedily as a proper regard for the interests of all concerned will permit, and when all debts are paid the assets remaining should be divided as if upon the day of the notice the copartnership had expired by an express limitation incorporated in the articles of its formation. We do not regard the petition as such an unequivocal declaration of their desire to reverse their original election as will justify us in saying that the service of it shall stand for the notice above indicated; for in it the petitioners admit that they are unable to say either that the partnership has or that it has not been dissolved; only that they believe, and therefore aver the former. This is to be interpreted as suggesting with hesitation that possibly the law of the events mentioned may have overborne their will in the matter and forced upon them a dissolution, contrary to their desire for a continuance of the partnership. In the fourth paragraph they allege that the copartnership continued to the death of Mrs. Brainerd, notwithstanding the previous deaths of partners, and in the sixth they request the court to order the sale of such property paid for from undivided profits as is not required for the proper use of the business of the partnership, and a division of the proceeds thereof, indicating thereby a desire not to bring that business to a termination.

As we are of opinion that the petitioners are not entitled to a decree declaring the partnership to have been dissolved at the death of Mrs. Brainerd, and ordering a division of the assets upon the basis of the managers' inventory and valuation made in March, 1873, for the ordinary purposes of the partnership, and as the finding does not support the allegation as to the wrongful investment of the profits, and furnishes no justification for the interference of the court in the matter of hastening a division thereof, we advise the superior court that upon the allegations in the petition the petitioners are not entitled to the relief prayed for; but we also advise that court to continue the petition upon the docket until the term succeeding that at which this advice is communicated to it, for the purpose of giving opportunity to the petitioners to file, if

they then are able and desire so to do, a supplemental bill containing allegations to the effect that they have given to the respondent, Erastus Brainerd, the notice suggested in the foregoing opinion, and that he thereafter conducted the business as that of a continuing partnership.

In this opinion the other judges concurred.

NISBET v. NASH ET AL.

(52 California, 540; Supreme Court, 1878.)

[1] **Purchaser becomes partner.** A stranger who purchases the interest of a partner and part owner in a mining claim, thereby succeeds to all the rights of his grantor and thereby becomes a partner with the other owners.

No partition or accounting without dissolution. A partner can not have partition and accounting without a dissolution of partnership; and a dissolution being found and decreed, the decree should provide for an accounting.

Appeal from the District Court, Second Judicial District, County of Butte.

Both parties appeal—the plaintiff from so much of the decree as refuses an accounting, and the defendants from the rest of it.

The complaint alleges that the plaintiff and defendants are tenants in common of a certain quartz claim, described as situated in the county of Butte, and known as the Spring Valley Quartz Mining Claim; that he is the owner in fee of an undivided one fourth of said claim, and that the defendants held like proportions; that the interests of said Chas. E. Sexey and William Fletcher are subject to the conditions of a certain bond referred to as "Exhibit A"; that a partition of said quartz ledge and premises can not be made without great prejudice to the owners thereof, and that it will be necessary —to do complete justice between the owners—to order and decree a sale thereof.

[1] Becomes partner by joining in the adventure: *Snyder* v. *Burnham*, 77 Mo. 52.

The plaintiff, for a further cause of action, avers: That on and previous to the 13th day of September, 1865, one John Nisbet and John Nash were the owners of and in possession of the said quartz ledge and premises hereinbefore described, and certain other property described in "Exhibit A," hereto attached, and made a part of his complaint.

That on the said 13th day of September, 1865, John Nisbet and John Nash, in pursuance of a contract and agreement then and there made and entered into by and between the said John Nisbet and John Nash, as the parties of the first part, and Charles E. Sexey and William Fletcher, as the parties of the second part, sold, remised, released, and quitclaimed unto the said parties of the second part the undivided one half of all of the premises and property hereinbefore mentioned and described, for and in consideration of the sum of five thousand dollars in United States gold coin, which said sum of five thousand dollars, gold coin of the United States, the said Charles E. Sexey and William Fletcher then and there agreed to pay to the said John Nisbet and John Nash, according to the terms of a written obligation bearing date on the day and year last aforesaid, which said obligation the said defendants, Charles E. Sexey and William Fletcher, then and there made, executed and delivered to the said John Nisbet and John Nash, a copy of which said written obligation is hereto attached, marked "Exhibit A," and made a part of his complaint.

That the said Charles E. Sexey and William Fletcher have failed and refused to comply with the conditions of said bond, and have failed and refused to work the said mining claims and other property, so as to develop the same or realize a profit therefrom; and that the said defendants have failed to pay to the said John Nisbet, plaintiff, or the said John Nash, the said sum of five thousand dollars, or any part thereof; and that the said defendants, Charles E. Sexey and William Fletcher, do now absolutely refuse to prosecute said work in the development of said mine, or contribute any means or labor to that end, so that a profit may be realized from the working of the same.

Plaintiff further alleges that the said Charles E. Sexey and William Fletcher are abundantly able and have the pecuniary means necessary to contribute to their portion of the expense in developing and making said mine productive.

The plaintiff further avers: That the defendants, Charles E. Sexey and William Fletcher, by virtue of the conveyance as aforesaid from John Nisbet and John Nash to them of the undivided one half of the quartz ledge, premises, and property above mentioned, were enabled to procure and they did procure from the Government of the United States, and have issued to them, in conjunction with the said John Nisbet and John Nash, a patent, granting and conveying to them the undivided one half of the quartz ledge and surface ground hereinbefore particularly described.

The plaintiff further avers: That on the 12th day of August, 1873, John Nisbet, for a valuable consideration, and by indorsement upon said written obligation, sold, assigned, and transferred all his right, title, and interest in and to the said written obligation and benefits thereof accruing to him, the plaintiff, and that plaintiff is now the legal owner and holder of said obligation.

The plaintiff further avers: That on the 12th day of August, A. D. 1873, John Nisbet, by deed, duly made, executed and delivered, conveyed to the plaintiff his undivided one fourth interest in the quartz ledge and surface ground hereinbefore particularly described, whereby and by means whereof plaintiff became and was the owner and in possession of the undivided one fourth part of said quartz ledge and surface ground, and entitled to all the rights and privileges and responsibilities, as a partner with the said defendants, and as the said John Nisbet had been previous to the conveyance last aforesaid; and that ever since the 12th day of August, 1873, he has been and now is a mining partner with the defendants in the management and working of said ledge and surface ground.

For a further cause of action herein, the plaintiff avers: That a short time subsequent to the conveyance made by John Nisbet and John Nash to Charles E. Sexey and William Fletcher, of the undivided one half of all the property hereinbefore mentioned, John Nisbet and the said defendants commenced work as mining partners in the working and development of said ledge, and that between that time and the commencement of this suit John Nisbet and the defendants, and since the sale by John Nisbet to plaintiff, the plaintiff and the defendants,

have done and performed a large amount of work and labor in and upon said quartz ledge and surface ground, as mining partners, and that they have expended, as such mining partners, in sinking shafts, running tunnels and drifts, building flumes, and doing general work in and upon said quartz ledge and surface ground, the sum of three thousand dollars and over, and of that sum there remains due from said partnership the sum of two thousand three hundred dollars, and that the defendants nor either of them have paid any part or portion of said last mentioned sum, either to John Nisbet or plaintiff, and that John Nisbet and plaintiff have been compelled to pay and assume the payment of said sum, and that thereby the defendants have become indebted to John Nisbet and plaintiff for the three fourths of the sum so paid and assumed by them, as aforesaid, to wit, in the sum of seventeen hundred and twenty-five dollars.

The plaintiff further alleges: That on the 12th day of August, 1873, John Nisbet sold, assigned, transferred, and set over to plaintiff the balance due him from said partnership, for moneys paid and assumed by him for the benefit of said partnership between the time of the commencement thereof and the 12th day of August, 1873; that the said balance is now due, owing, and coming to him from defendants, as mining partners with the said John Nisbet; and that the said plaintiff claims and holds a lien upon the said quartz ledge and surface ground, as a mining partner, for the payment of said balance, to wit, the sum of seventeen hundred and twenty-five dollars.

Plaintiff prays judgment for partition, by sale, of the mining property described in his complaint, for an accounting of the mining partnership, and for a division of the proceeds of said sale, after payment of costs and expenses of sale, between the parties to the action according to their several interests and rights; that plaintiff have two thousand five hundred dollars of said proceeds out of the portion going to said defendants Chas. E. Sexey and William Fletcher, and judgment over for any balance of said sum remaining unpaid; that one thousand seven hundred and twenty-five dollars of such proceeds going to defendants Nash, Sexey, and Fletcher be paid to plaintiff on partnership account, with judgment over against each of said defendants for one third of any balance of said account remaining unpaid.

"EXHIBIT A."

"Know all men by these presents: That we, the undersigned Charles E. Sexey, of Yuba county, State of California, and William Fletcher, of the city of Marysville, in said county of Yuba, are hereby jointly and severally held and firmly bound unto John Nash and John Nisbet, both of Butte county, State of California, in the penal sum of five thousand dollars, gold coin of the United States of America, for the payment of which said sum to the said John Nash and John Nisbet, their heirs, executors, administrators or assigns, we hereby bind ourselves and each of us, our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this thirteenth day of September, in the year of our Lord one thousand eight hundred and sixty-five. Whereas, by a certain indenture, bearing even date with these presents, and made between the said John Nisbet and John Nash, parties of the first part, and said William Fletcher and Charles E. Sexey, parties of the second part, the said parties of the first part did, for the consideration therein mentioned—one part of said consideration being the above written bond or obligation—remise, release and quitclaim unto the said parties of the second part the following described property, viz., being mining property and real estate, that is to say:

(Here follows description.)

"With the improvements and appurtenances, to the end that the whole of the said mining property and real estate, with the improvements and appurtenances, (the undivided one half whereof is, by the indenture now in recital, remised, released, and quitclaimed to the said Charles E. Sexey and William Fletcher) may henceforth be held by all them—the said John Nash, John Nisbet, William Fletcher, and Charles E. Sexey—as tenants in common, in equal shares and proportions; and it is the intention of all the said parties forthwith and henceforth to occupy, work, and cultivate the said land, mining property and premises for their mutual benefit. Now, the condition of the above written bond or obligation is such that if and so fast as the net profits of working and cultivating the said land, mining property, and premises shall be realized and ascertained, and partition and distribution thereof can be made among the parties entitled thereto, the said Charles E. Sexey

and William Fletcher shall pay or cause to be paid to the said John Nash and John Nisbet, jointly and equally (over and above the one half of such net profits to which the said John Nash and John Nisbet are entitled in their own right), one half of the said net profits, to the extent of five thousand dollars, United States gold coin, without interest, then these presents shall be void; otherwise in full force and effect.

"MARYSVILLE, California, 13th September, 1865.

"CHARLES E. SEXEY. [SEAL.]

"WILLIAM FLETCHER. [SEAL.]"

Their demurrer to the complaint having been overruled, defendants answered, admitting that John Nisbet and John Nash did convey to defendants Sexey and Fletcher the undivided one half of all the premises and property in said Exhibit "A" described, the same including the premises and property in the complaint described, and other property, and that the sum of five thousand dollars, named in said Exhibit "A," and to be paid as therein stipulated and agreed, was the consideration for all the premises and property in exhibit, and not for the premises in the complaint described alone.

And further answering, defendants aver that the premises and property other than the premises and property in the complaint described, for the conveyance of which the said sum of five thousand dollars was to be and was the consideration, were at the time of such conveyance worth fully as much as the premises and property in said complaint described, and constituted fully one half of all the property so conveyed in value.

Further answering by Sexey and Fletcher, they deny that plaintiff ever was or is, as grantee of John Nisbet, or otherwise, an owner or tenant in common with them in said mining property. They deny that John Nisbet and John Nash, or either of them, conveyed an undivided half or other interest in said mining claim to said defendants, or either of them, for the sum alleged, and aver that said sum was the consideration also for other property, worth as much as the interest conveyed in said mining claim. They deny that said defendants Sexey and Fletcher have failed or refused to comply with any of the conditions of said bond, or to work, or con-

tribute by means or labor, to the development of said mining claim, but aver that they have contributed largely thereto, and have complied with all the conditions of said bond. They deny the alleged indorsement or transfer of said bond to plaintiff, or that thereby or otherwise he ever was or is a partner of said defendants, but they admit that they and John Nisbet have done a large amount of work, and have expended over three thousand dollars on said mining claims. They deny that any part of said sum ever was or is due to said plaintiff, but aver that all expenses and indebtedness incurred or authorized on partnership account have been fully paid and discharged. They deny that John Nisbet and plaintiff, or either of them, ever assumed or paid any part of said expenses or indebtedness, or any sum whatever, for any work or expenses incurred or authorized in the development of said mining claims by John Nisbet and defendants, or any of them. They deny that any sum or balance of any indebtedness on any account, by assignment from John Nisbet, or otherwise, ever was or is due or owing from defendants to plaintiff.

Wherefore, the premises considered, defendants pray judgment that plaintiff take nothing by his action and for their costs.

The cause was tried without a jury, and among other facts the court found: That the plaintiff, John Nisbet, Charles E. Sexey, William Fletcher, and John Nash are joint owners and tenants in common, each of an undivided one fourth interest in and to the premises and mining property described in the plaintiff's complaint; that all the allegations of plaintiff's complaint, down to the allegations of a mining partnership, are true.

The court further found that the parties to the action are not mining partners.

For further facts reference is made to the following extracts from briefs of counsel:

BELCHER & BELCHER, for defendants and appellants.

1. One of several parties engaged in a mining venture may, at his pleasure, sell his interest in the property acquired; but he can not, except under special circumstances of wrong

or oppression, maintain an action for partition. Our statute fixes the relations, duties and liabilities of parties engaged in mining ventures toward one another; and it was the intention of the legislature, in giving to a party thus engaged with others the right to put another in his place without interrupting the business, to take away the common law right of requiring a dissolution of the copartnership, and as well the right of a co-tenant to demand partition of the common property. As a rule it would be ruinous to mining enterprises if the owner of a small interest in the mine could demand as matter of right partition or sale of the mining property.

2. The majority in interest of a mining partnership have the right to control the working of the mine and the affairs of the company: *Dougherty* v. *Creary*, 30 Cal. 300.

In this case, Nash, Fletcher, and Sexey owned three fourths of the mine, and John Nisbet the other fourth. Together they had prosecuted work for more than three years for opening and developing the mines, and had expended more than three thousand dollars on the work. The contractors, of whom the plaintiff was one, abandoned their contracts, and the company, or at least three of the four members of it, determined that it was for the best interest of the company to suspend work for the time and to wait until a supply of water could be obtained at reasonable rates. They did not abandon the mine nor the purpose to work it, but only suspended work for the time. This the majority in interest had the right to do: Civil Code, Sec. 2520.

That section declares that "the decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business."

3. Under the contract between Sexey and Fletcher of the one part, and Nash and Nisbet of the other, the plaintiff was not entitled to demand or claim any portion of the five thousand dollars purchase money from Sexey and Fletcher until it should be made out of their share of the net profits arising from the use of the property conveyed.

P. O. HUNDLEY, for appellant, plaintiff.

1. That when Fletcher and Sexey purchased an undivided half of the mining claim from Nisbet and Nash, and actually

engaged in the working of the claim, expending the sum of three thousand dollars and over, they became mining partners: Civil Code, Sec. 2511; *Taylor* v. *Castle*, 42 Cal. 370.

The facts of the case clearly show that they were mining partners; they purchased the property for the purpose of working it as a mine.

They actually engaged in the working of the mining property as they had agreed to do. It was continued from 1865 to 1869.

They expended over three thousand dollars in that time in the working and development of the mining premises.

2. The partnership having been formed and commenced its existence, it continued until dissolved in some mode known to the law.

The evidence in this case nowhere discloses the fact of the dissolution of the partnership thus formed, nor was it in fact ever dissolved.

3. That the sale made by John Nisbet to William Nisbet of his interest in the mining property, and the assignment of the amount due to him from the partnership, did not dissolve the partnership: One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. Civil Code, Sec. 2516; *Duryea* v. *Burt*, 28 Cal. 569; *Taylor* v. *Castle*, 42 Cal. 370.

4. The court having decided that appellant was entitled to partition of the property, he had also, under the allegations of the complaint, a right to an accounting of the partnership transactions, provided the evidence in the case disclosed the fact that there was a partnership existing between the owners. This, we think, the evidence clearly established.

By the Court.

The court erred in finding that plaintiff and defendants were not mining partners. They were.

The court should have found whether or not the partnership had been dissolved.

If on a re-trial the district court shall find that the partnership has been dissolved, the decree must be for an accounting. If the court shall find that it has not been dissolved, it will become its duty to determine whether or not plaintiff is enti-

tled to a decree of dissolution; and if it shall find that plaintiff is entitled to such decree, the decree should also provide for an accounting.

It is not necessary, at this time, to determine whether John Nisbet is a necessary party to this action, or to proceedings for an accounting.

Judgment and orders denying new trial reversed, and cause remanded for a new trial—each party to pay one half the costs of these appeals.

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[1]KAHN v. THE CENTRAL SMELTING COMPANY.

(102 United States, 641. Supreme Court, 1880.)

Findings before judgment. Where, under the practice established in Utah, issues are tried by the court, its findings of fact should be announced and filed before the entry of the judgment.

Unauthorized entry of new finding. After such entry an additional finding, made at the request of either party without notice to the other, forms no part of the record.

Conveyance by partner. A member of "a mining partnership" may, without dissolving it, convey his interest in the mine and business.

Insufficient finding as to partnership. In a suit to compel an account for the proceeds of a mining claim, a finding by the court that there was no such co-tenancy between the parties in the mine in controversy as to entitle the plaintiff to an accounting, is a mere legal inference, and not a sufficient finding of fact upon which to base a decree.

Delectus personæ. A different rule from that which governs the relations of members of a trading partnership to each other is recognized as applicable to the relations to each other of members of a mining association.

Appeal from the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

JOHN R. MCBRIDE and GEORGE H. WILLIAMS, for the appellant.

[1] Reversing *Same* v. *Same*, 2 Utah, 371.

SAMUEL SHELLABARGER and JEREMIAH M. WILSON, *contra.*

FIELD, Justice, delivered the opinion of the court.

This is a suit to compel the defendants to account for the proceeds of a mining claim in Utah, known as the Montreal claim, and to pay over to the plaintiff the amount to which he may be entitled upon such accounting. The complaint alleges that on the 14th of December, 1874, the plaintiff and two other persons, by the name of Deronso and Berassa, were the owners and tenants in common of the claim, each having an undivided third; that they then entered into an agreement to work the claim for the ores and metals it contained, and from that time until February, 1876, they were a mining partnership engaged in working the mine, bearing the expenses and sharing the profits equally, Deronso and Berassa having the immediate direction, control and management of its workings; that on the 1st of February, 1876, his associates sold and transferred their interest in the mine, and in the tools, implements and appurtenances connected therewith, to the defendant, Isador Morris, through whom the other defendants immediately acquired all the rights they possess; that from that time until the 10th of April, 1876, the defendants were in full charge and possession of the property, and extracted from the mine and sold about sixteen hundred tons of ore, worth about $45,000, the expense of extracting and marketing of which did not exceed $10,000; that since the first of February the plaintiff has been a partner with the defendants in the mining claim and is entitled to his share of the profits made, being one third of the whole, and has demanded of the defendants a statement of their work and an accounting, but they have refused to comply with his demand, or to give him any information on the subject or any share of the profits, and have denied him access to the books of account of the concern, and that the profits amount, according to his information and belief, to about $35,000. He therefore prays for a decree establishing the partnership between him and the defendants, and directing an accounting from them and the payment of the amount found due to him upon such accounting, and for such

other and further relief as to the court may seem meet and equitable.

The answer of the defendants traverses the allegations of the complaint, and avers that on the 31st of January, 1876, the defendant, Isador Morris, found Deronso and Berassa in the actual possession of a portion of the Montreal mine, of which they claimed to own two thirds; that, believing they owned such interest, Morris paid to them $25,000 for it, and received a quit claim deed from them; that on the following day, for the like sum, he conveyed, by a similar deed, that interest to one Wadsworth in trust for such persons as a majority of the members of the Sandy Smelting Company of Salt Lake City might direct, and that afterward such majority conveyed the same to the defendant, the Central Smelting Company, remaining, however, in the possession of and working the mine until about March 1, 1876, when the smelting company took possession of it and afterward held it exclusively until the 1st of April following. The answer further avers that a short time prior to this last date the mine was claimed by another company, called the Old Telegraph Company, under an older location; that thereupon the Central Smelting Company and its vendors caused the prior location and the mining claim to be carefully examined by experienced miners, and upon that examination they became satisfied the older location and the Montreal mine were one and the same vein or lode, and that the Montreal mine was owned by the holders of the earlier location; that having become thus satisfied of this fact, the Central Smelting Company abandoned the Montreal mine, and has not since held, used or occupied the same, or exercised any acts of ownership over it.

The answer further avers that the defendants never worked the Montreal mine or extracted ore from it, under any agreement with the plaintiff, or by his advice or consent, or in conjunction with him or as his mining partners; that they have always refused to recognize him as a party in any work, labor, or management, or business of the mine; that the proceeds of the mine received by the Central Smelting Company and its immediate vendors, after deducting the expenditures, show a net profit of about $12,000, which the defendants hold until the determination of suits now pending between the plaintiff

and the owners of the alleged earlier location; that those suits are brought to determine whether the Montreal mine and the earlier location are one and the same lode, and which of the parties is entitled to its possession and the proceeds; and the defendants pray for their protection that the prosecution of this suit may be restrained until those suits are determined.

On the trial, evidence was produced by both parties, and from it the court found as facts:

First. That there was no partnership between the plaintiff and the defendants, as charged in the complaint.

Second. That there was no such co-tenancy between them in the mine in controversy as entitled the plaintiff to an accounting; and held as a conclusion of law that he had no right to recover in the action, and that the suit should be dismissed.

These findings were filed Nov. 21, 1877, and judgment upon them was entered the same day. From this judgment the plaintiff appeals to this court. Fourteen days after its entry the judge who heard the case, at the request of the plaintiff, filed further findings of fact.

It does not appear that any notice was given to the defendants of any intended application to the court to make any findings in addition to those originally filed; and to make such findings without such notice was irregular. The practice, if permitted, would lead to great abuses. It is not absolutely necessary in any case that the findings should accompany the announcement of the decision of the court; but when they are required—and by the practice established in Utah they are required in all cases where issues of fact are tried without a jury—they should be filed before the entry of the judgment or decree, as in such cases, upon them the judgment or decree rests. If either party is dissatisfied with them and desires more full or additional ones, he should, within a reasonable time during the same term, and before an appeal is taken or a writ of error sued out, apply to the court, upon proper notice to the adverse party, to make such fuller or additional findings; and if the application is granted, the additional findings should show on their face why they are made. The additional findings in this case not having been thus made, were properly stricken from the transcript. Taking, then, the original find-

ings, let us examine whether they meet the issues raised by the pleadings and support the decree ; for, under the practice of Utah, where, in a case seeking equitable relief, the facts are found by the court (and not by a master or a jury where the findings are merely advisory) they will be taken as its conclusions upon the evidence, and their sufficiency for the decree rendered will be considered.

The plaintiff avers that his association with his co-tenants of the mine was a mining partnership, and seeks to enforce his rights as a member of such partnership, and to obtain such other and further relief as he may be equitably entitled to. The opinion of the judge before whom the case was heard shows that he did not recognize the existence of any partnership in mines differing from ordinary partnerships, and his finding that there was no partnership, as alleged, between the plaintiff and the defendants, necessarily followed. The allegations of the complaint, whilst asserting a mining partnership, show that no other partnership existed after the sale of Deronso's and Berassa's interest. Such sale would have ended any ordinary partnership.

Mining partnerships as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed without them successful mining would be attended with difficulties and embarrassments much greater than at present. In *Skillman* v. *Lachman*, 23 Cal. 198, the question of the relation existing between parties owning several interests in a mine came before the Supreme Court of California, and that court said that "whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that where the several owners unite and co-operate in working the mine, then a new relation exists between them; and, to a certain extent, they are governed by the rules relating to partnership. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership." 23 Cal. 203. The same doctrine is asserted in numerous other cases, not only in that court, but in the courts of England. Associations for

working mines are generally composed of a greater number of persons than ordinary trading partnerships; and it was early seen that continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members, or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was, therefore, recognized as applicable to the relations to each other of members of a mining association. The *delectus personæ*, which is essential to constitute an ordinary partnership, has no place in these mining associations. *Duryea* v. *Burt*, 28 Cal. 569; *Settembre* v. *Putnam*, 30 Ib. 490; *Taylor* v. *Castle*, 42 Ib. 367. There are other consequences resulting from this peculiarity of a mining partnership, particularly as to the power of individual members to bind the association, upon which there is no occasion now to express any opinion: *Skillman* v. *Lachman*, *supra*; *Dickinson* v. *Valpy*, 10 B. & C. 128; *Ricketts* v. *Bennett*, 4 C. B. 686.

But if the relation of the plaintiff to his associates could not be considered as one of a mining partnership, he was still entitled to an accounting from them, if, as alleged by him, he was joint owner with them in the mine. They went into possession of the property under a conveyance from his co-tenants, and admit that whatever proceeds they have received from it were taken under a claim of ownership derived from that source. They have, upon their own averments, only a claim, in any event, to two thirds of the proceeds; and if the plaintiff was a tenant in common with them, they can only refuse his demand to the other third by repudiating their own right to any portion. If a co-tenant, he had a right to call for an accounting, whatever might be the ultimate result of the claim of third parties to the whole proceeds as the owners of the mine under a prior location. He was, therefore, entitled to a finding on the question of his co-tenancy. The judge of the district court seemed to recognize this position, for after finding that there was no partnership—following in this respect his peculiar notions as to the non-existence of such an association as a mining partnership—he passed upon the claim to an accounting as a tenant in common of the mine with the defendants, and found

"that there was no such co-tenancy between the plaintiff and defendants in the mine in controversy as entitled the plaintiff to an account." This is not a sufficient finding of fact upon which to base a decree; it does not state that there was no co-tenancy between the parties; it implies that there was a co-tenancy; it only states that there was not such an one as entitled the plaintiff to an accounting. This is a mere legal inference, not the finding of the fact. If a co-tenancy of any kind existed, it is a question of law whether or not it entitles one co-tenant to an accounting from the others.

In considering the whole case, we think that justice will be subserved by a new hearing. The defendants recognize the possibility of the plaintiff ultimately establishing his right to a portion of the proceeds of the mine in their hands against the claimants of the alleged earlier location. They aver that they hold the proceeds subject to the determination of pending suits between those parties. The present decree, if affirmed, would cut off any claim of plaintiff, even should he prevail in that litigation.

The decree will be, therefore, reversed, and the cause remanded, with direction to the Supreme Court of the Territory to send it to the district court for a new hearing, the parties to be at liberty to produce new proofs; and it is so ordered.

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[1] THE FIRST NATIONAL BANK v. BISSELL ET AL.

(2 McCrary, 73. Circuit Court, District of Colorado, 1880.)

Agreement to purchase on joint account. If two or more persons agree among themselves to purchase property for their joint account, and the purchase is accordingly made by one or more of them on behalf of all, the liability of each to pay his share of the purchase money, and his right to an interest in the property can not be controverted. So, also, if two or more persons enter into a contract with another to purchase

[1] Affirmed by the Supreme Court of the United States in 114 U. S. 252, under the style of *Bissell* v. *Foss*, where the *syllabi* of the case are as follows:

There is no relation of trust or confidence between mining partners, which is violated by the sale and assignment by one partner of his share in the company assets and business to one or more of his associates, without the knowledge of the other associates.

property, all matters being fully arranged in the agreement, the equal right of all vendees to proceed in the execution of the contract may be conceded. But neither one of the vendees under such contract could take the title to himself, until default by the party excluded, in some manner to which he was bound by the terms of the agreement.

Purchase as trustee—Right to follow the fund. If one take unto himself a title which he has purchased with the money of another, he is a trustee for the true owner, who may rightfully follow the fund, wherever it may be miscarried.

Agreement to purchase gives no right of property. An agreement between two parties to purchase the property of a third could give no right to either until consummated in the purchase of the property.

Agent to purchase may repudiate his agency. If one who is clearly an agent for another to purchase property repudiate the agency and act for himself, using his own funds, he can not be declared a trustee for his principal, although the latter may have been misled by the former.

[1] **Co-tenants may purchase of each other.** Co-tenants are not at liberty to assail the common title, but they may purchase of each other, the same as a stranger might purchase from any or all of them. The purchase by one co-tenant of the interest of another will not inure to the benefit of all who retain an interest in the property.

[2] **Fidelity to partnership.** Fidelity to the partnership is the highest duty of its members; no member can be allowed to turn the partnership concerns to his own account, and one who attempts to do so will be properly called to account by the courts; but it must be made to appear that the malversation is of partnership effects.

[3] **No right of pre-emption between mining partners.** In mining partnerships the firm has no right of pre-emption as to the interests of retiring partners, especially where the parties are tenants in common of the mines, themselves, and not merely partners in the business of mining. In such an association it can not be said that there is, in the collective body, a right to acquire new interests which its members are bound to respect. Each member holds his interest in his own right, with power to dispose of it as he thinks proper, and is free to deal with an associate, or with a stranger in respect to such interest. And each member is at liberty to buy from his associates, and thus enlarge his interest in the whole property, without reference to the partnership relation, and such purchase will not inure to the benefit of other joint owners.

In Equity.

L. C. ROCKWELL, for plaintiff.

The record in this case discloses no equitable reason why the defendants in error, who purchased the interest of third parties in a mine in which all were jointly interested with the plaintiff in error, should be held bound to share with the plaintiff in error the interest so purchased.

[1] *Bradbury* v. *Barnes*, 11 M. R. 354.

[2] *Clegg* v. *Edmondson*, 8 M. R. 180.

[3] *Redmayne* v. *Forster*, 10 M. R. 551.

W. S. DECKER and D. P. DYER, for defendants.

HALLETT, D. J.

In the month of September, 1878, Charles R. Bissell, Simon H. Foss and Absalom V. Hunter owned in equal parts three fourths of the Winnemuc Mine, and three fourths of seven sixteenths of the New Discovery Mine, near Leadville, in this State. The remaining one fourth interest in the same property was owned by Edward Handley, George W. Robertson and Amos B. Rawlings, and all were engaged in working the mines, which were very productive. In their relations to each other as owners of the property, the parties named were tenants in common; and in respect to their operations in working and mining on the property, they were mining partners. As to their partnership relation, nothing more is shown than the fact that they were working the mines and sharing in the proceeds according to their respective interests, so that the relations of the parties were not the subject of express contract, and must be ascertained from their ownership of the property and their conduct in working it. In the month of September, 1878, the parties were greatly harassed by adverse claimants of the property, and Handley, Robertson and Rawlings became anxious to dispose of their interest. The Winnemuc property was known to be valuable, having yielded about $40,000, which was paid for the seven sixteenth interest in the New Discovery in this month of September. There was also in bank to the credit of the company something like $16,000, one fourth of which belonged to the Handley party. Bissell and Foss, who were on the ground, were anxious to purchase the interest so offered, not solely on account of its intrinsic value, but also to prevent adverse claimants from acquiring an interest in their title, and thus securing a foothold on their side. So anxious were they that they agreed to decry the property as much as possible, and to magnify the dangers besetting it, in order to increase the alarm of the Handley party, and induce them to sell at a low price. The subject of the purchase became a matter of consultation and conference between Bissell and Foss, and they agreed as to the propriety of making it, if the property could be had at

a reasonable price. But it does not appear that there was any definite understanding as to what sum should be paid for it, or where the money for that purpose should be obtained. Whether the money in bank to the credit of the company was available for that purpose, or had been pledged to persons who had entered themselves as surety in certain attachment suits which had been brought against the company, has become a subject of controversy in the record. Probably it was a part of the plan to represent to the Handley party that the money in bank was so pledged in order to induce them to sell at a low price. To propose to pay for the property out of the company's funds would have opened the eyes of the Handley party to the nature of the transaction, if anything could produce that result. Hence the necessity for some pretense that the money was not then in the command of the parties, and that, like the property, it was beset with dangers of which no man could then form a just estimate. However this may be, there was no understanding that this fund should be used in the purchase of the property, nor was there any agreement as to how the money should be raised for that purpose.

As the result of the several interviews between Bissell and Foss on the subject of the purchase, it may be said that they were united in a purpose to get the Handley interest for partnership account, if it could be obtained at a cost of $30,000 or less, but nothing was done toward raising the money. With this end in view negotiations took place with members of the Handley party, but nothing was accomplished until a few days later, when Hunter arrived at Leadville. Whether Hunter was then advised of what had taken place between Bissell and Foss and the Handley party, we are not informed, but upon his arrival a new arrangement was made between himself and Foss for obtaining the Handley interest, and apparently without the knowledge of Bissell. This was, in substance, that Hunter was to assume to sell to Foss his one fourth interest in the property for $15,000, in order to induce the Handley party to sell their one fourth interest at the same price. And Hunter was to furnish the money for the Handley interest, and to have two thirds of that one fourth, or two twelfths of the whole, the remainder of that one fourth, or one twelfth of the

whole, to go to Foss. This trick was successful, and Foss was made the grantee of one half interest in the property from Hunter, Handley, Robertson and Rawlings, of which he a few days later reconveyed five twelfths to Hunter. In this performance Handley, Robertson and Rawlings received $300 from Foss, and $14,700 from Hunter, who pretended to act in that matter as the agent of Foss, but really furnished the money himself. Before the transaction was fully completed by the payment of the money, and probably on the day the deed was made and before it was delivered, Bissell was advised of it, and at once asserted his right to an equal share in the property with Hunter and Foss, and expressed his willingness to pay his part of the purchase money. That claim was denied, and the property having been sold and the proceeds deposited in the First National Bank of Denver, this suit was brought by Foss and Hunter against Bissell and the bank to determine the right to the fund. The bank was dissatisfied with its position in the suit, and filed its cross-bill to compel the others to interplead and adjust their differences, and exonerate the bank from liability. Issue was joined on that bill, but the contestants have not acceded to its prayer otherwise than by the original pleadings. No question is now made, however, as to the form of the issue, and none will be considered by the court.

The matter in controversy is whether, upon what took place in the purchase of the Handley interest in the mines, Bissell is in equity to be regarded as a party thereto. Out of the relations of the parties as mining partners and tenants in common, or joint tenants of the three fourths interest in the property, as well as from the conference and agreement between Foss and Bissell in respect to the purchase of the Handley interest, it is contended that a duty arose on the part of Foss toward his associates which was violated by him in making the purchase for Hunter and himself only. In other words, the position is assumed that relations of trust and confidence existed between the parties by which the acts of each relating to the common property should be controlled, and whatever was done by any of the owners should be taken to be for the advantage of all; or that Bissell was too confiding and was overreached by Foss, who, while claiming to act for all, sought to appropriate the

purchase to Hunter and himself. Familiar principles are invoked in support of this position, and we shall best ascertain how far they may be applicable to the case by considering them with reference to the attitude of the parties in the several positions in which we find them in the record. And first let us put out of view their association as mining partners and tenants in common, and consider whether by the conference and agreement to purchase the property between Foss and Bissell, anything was established upon which the claim of the latter may rest. If two or more persons agree among themselves to purchase property for their joint account, and the purchase is accordingly made by one or more of them on behalf of all, the liability of each to pay his share of the purchase money, and his right to an interest in the property, can not be controverted. So, also, if two or more persons enter into a contract with another to purchase property, all matters being fully arranged in the agreement, the equal rights of all vendees to proceed in the execution of the contract may be conceded. To illustrate that proposition, if the Handley party had agreed with Bissell, Foss and Hunter to sell to them their interest in the mines, no one of the vendees could have taken the title to himself under that contract until default by the party excluded, in some matter to which he was bound by the terms of the agreement. Again, if one takes unto himself a title which he has purchased with the money of another, he shall be a trustee for the true owner, who may rightfully follow his fund however it may be miscarried. But the record presents no one or more of these facts. There was, indeed, an agreement between Foss and Bissell to purchase the Handley interest, if that may be called an agreement which lacks the essential features of a price for the property and money to pay for it. But Handley, Robertson and Rawlings were not parties to that agreement, and therefore it was not in itself an agreement to purchase, but to negotiate with them for the property. In that form it presents no features which can affect the title to the property. At most it was an agreement between intending purchasers which could give no right to either until it should be consummated in the purchase of the property. If we regard Foss and Bissell as agreeing to an agency in respect to the purchase of the property,

the case is not different. For if one who is clearly an agent of another to purchase property, repudiate the agency and act for himself, using his own funds, he can not be declared a trustee for his principal. *Burden* v. *Sheridan*, 36 Iowa, 125. A different rule appears to be laid down in Story's Eq. Jur. Sec. 1211 *a*, but its limitation will be found in another section of the same volume, Sec. 1201 *a*.

An attempt was made in argument at the bar to put this case upon the footing of a numerous class in the books in which real property was granted upon a parol pledge from the grantee to make some disposition of it; as where a son has been granted an estate upon condition that he will support his father during his lifetime, or where a devisee has promised the testator to divide the estate with another. In all such cases the trust may be established by parol, and the trust itself stands on the plainest principles of justice. But to point out the distinction between those cases and the case under consideration can hardly be necessary. Foss received nothing from Bissell on account of the purchase of the property, nor did he take the property with the understanding that he should admit Bissell to an interest in it. If he had received the property upon a pledge to hold it for Bissell, or to make some other disposition of it, his failure to do so would be a fraud upon the grantors as well as the beneficiary, of which either might complain, and the principle invoked would be applicable. But here there was nothing of that kind. The property was sold to Foss, who in fact received it, and Bissell comes to complain that he was not admitted to the purchase as by his agreement with Foss he should have been. However he may have been misled by the conduct of Foss, he was not in fact a purchaser, and Foss did not receive the property to his use in any way, and therefore he acquired no interest in it.

If now we turn to the co-tenancy of the parties we find in that relation nothing of weight respecting the question under consideration. For although tenants in common are not at liberty to assail the common title by which they all hold, they may deal with each other touching their respective interests: Freeman's co-tenancy, 165. While Bissell, Foss and Hunter, and the Handley party were all bound to maintain the com-

mon title, each was at liberty to purchase from the other in the same manner as a stranger might purchase from any or all of them: *Alexander* v. *Kennedy*, 3 Grant's Cases, 380. It has never been claimed that a purchase by one co-tenant of the interest of another would inure to the benefit of all who should retain their interest, and certainly there is nothing in the relations of such owners to support that doctrine.

The limitations to individual action on the part of the members of a partnership in respect to those matters which may or may not be within the scope of the partnership business are, in many cases, not easily defined. We know, however, that fidelity to the partnership is the highest duty of its members, and that no member can be allowed to turn the partnership concerns to his own account. And whenever a member is found to be seeking a private advantage from partnership dealings, the courts are prompt to correct such an abuse of the confidence reposed in him by his associates. A familiar application of the principle is found in the cases cited by counsel, in which it is held that a partner can not in his own name renew the lease of the premises used by the firm. In New York the doctrine was applied to a case in which the renewal did not begin until the copartnership had expired by its own limitation, and the reasons assigned by the court are entirely satisfactory: *Mitchell* v. *Reed*, 61 N. Y. 123. The position assumed in these cases is that the renewal is auxiliary to the original lease, and so far connected with it that it shall be regarded as a part of it; and as the original lease was owned by the firm, any attempt by a member to appropriate the renewal to his own use is a direct conversion of the property of the firm. In other words, the doctrine is, that a member of a firm shall not be permitted to take unto himself the property of the firm, and the renewal of the lease whereof the firm holds the original is such property, and therefore it is protected for the use of the firm. To invoke the principle, however, it is obviously necessary to show that the malversation was of the partnership funds or effects, for if it be otherwise no member of the partnership can complain.

And this brings us to inquire, what right or interest of the copartnership of which he was a member was used or asserted by Foss in making the purchase of his associates' interest in

the mines? Is it true that in a mining partnership the firm has a right of pre-emption as to the interests of retiring partners in the mines? The answer is not doubtful. Where the partnership is formed expressly to work mines, and the mines are held by lease, the lease and renewal of it is, as the courts have held, partnership property. But in the case at bar the partnership arose out of a community of ownership in the mines, and the parties were in a very large sense involuntary associates. They came together upon the ground that they were tenants in common of the mines and not upon any agreement to engage in the business of mining. Indeed, they had no agreement whatever, respecting their joint operations, but they stood solely on their ownership of the property, in consideration of which they united for the purpose of working it. They were partners in the working, but not in the ownership of the mines, and their firm was a thing of the hour without hope of existence. In that kind of association it can not be said that there is in the collective body a right to acquire new interests which its members are bound to respect. The object of the partnership was to take out ore, and in all things directed to that end, each member owed allegiance to the company. Beyond that, they were entirely free to act touching their interests in the mines, as well as other individual property. Each member held his interest in the mines in his own right, with power to dispose of it as he sh uld think proper, and each was free to deal with his associate or with a stranger in respect to such interest. So, also, each member was at liberty to buy from his associates, and thus enlarge his interest in the whole property without reference to the partnership relation. On the whole case no reason can be found for saying that the purchase of the Handley interest inured to the benefit of Bissell, or that he had any share in it. If in making it Foss violated his promise to Bissell, in that there was moral wrong, and possibly there may be some remedy for the breach. But it can not be said that by such promise only, Bissell, who furnished no part of the purchase money, acquired an interest in the mines.

The money will be awarded to Foss and Hunter.

HIXON V. PIXLEY.

(15 Nevada, 475. Supreme Court, 1880.)

Verdict upon conflicting evidence not disturbed. In an action of trover against P. and McC. as copartners to recover $23,390 for the alleged wrongful conversion of certain shares of mining stock, the plaintiff relied upon two grounds to sustain the action against P. 1st. That he was a partner at the time of the alleged conversion. 2d. That if not a partner in fact, he suffered himself to be held out to the world as such, and thereby became liable to plaintiff. There was a verdict and judgment for plaintiff, and P. appealed upon the ground that the evidence was insufficient to support the verdict. *Held*, that there being a substantial conflict in the evidence upon the first point, the verdict of the jury should not be disturbed; and that the evidence was clearly sufficient to sustain the verdict upon the second point.

Holding out as partner after notice of dissolution. If a retiring partner, after notice of dissolution published, continues to hold himself out to the world as a partner, he must, before he can avail himself of such publication, prove that knowledge thereof came to the party asserting his liability.

Idem—Old and new customers. If one partner, after the dissolution of the copartnership, consents that his name shall be held out to the world as a partner, all persons, whether new customers or not, will be presumed to deal with the firm upon this partner's credit as well as upon the credit of the other partner.

[1] **Belief of plaintiff that retiring member was still a partner.** If plaintiff was aware of the previous copartnership, and had no knowledge of the dissolution, and was misled by the acts of the retiring partner, and induced to deal with the firm upon the belief that the retiring partner was still a member of the firm, it would not be incumbent upon her to show "that she would not have so dealt but for that belief."

Lapse of time as affecting knowledge of dissolution. The defendant asked the court to instruct the jury, that in determining whether plaintiff was ignorant of the dissolution, they should take into consideration, among other things, "the lapse of time occurring after the alleged dissolution, and prior to plaintiff's dealings with McConnell & Co." The court struck out these words. *Held*, upon a review of the entire instruction, that the jury were not misled to the prejudice of the defendant. (Beatty, C. J., dissenting.)

Allegation of value material. The allegation of value in an action of trover is a material averment. If not denied it need not be proven.

Time of conversion immaterial. The allegation as to the time of conversion, in an action of trover, is immaterial.

Instruction as to notice and demand. The instruction as to notice and demand, as modified, read as follows: "If you find from the evidence

[1] *Martyn* v. *Gray*, 14 Com. B. N. S. 824; *Carter* v. *Whalley*, 11 M. R. 262; *Vice* v. *Fleming*, Id. 241.

that the stocks mentioned in the complaint were sold by McConnell & Co.. pursuant to a lawful notice to the plaintiff that they would be so sold, if she failed to make her margins good within a time specified by the notice, and that the plaintiff did so fail, then your verdict will be for the defendant, provided you find that defendant was entitled to sell said stocks upon the giving of such notice, and the failure of the plaintiff to comply with the demand of such notice." *Held*, no error.

Appeal from the District Court of the Second Judicial District, Ormsby County.

LINDSAY & DIXON, for appellant.

R. M. CLARKE, for respondent.

HAWLEY, J.

This is an action of trover, brought by plaintiff to recover from defendants, Robert F. Pixley and Isaac McConnell, as copartners, the sum of twenty-three thousand three hundred and ninety dollars, for the alleged wrongful conversion of certain shares of mining stock.

Defendant McConnell suffered default.

Defendant Pixley appeared, and filed an answer denying that at the time of the alleged transactions with plaintiff he was a partner with the defendant McConnell.

The plaintiff, in order to sustain this action against Pixley, relied upon two grounds: First. That he was a partner at the time of the alleged conversion. Second. That if not a partner in fact, he suffered himself to be held out to the world as such, and thereby became liable to plaintiff. The jury found a verdict in favor of plaintiff.

The defendant, Pixley, appeals.

1. Appellant claims that the evidence is insufficient upon either branch of the case to justify the verdict.

It appears that the defendants in March, 1875, entered into a copartnership, in Carson City, Nevada, to carry on and conduct the business of stock brokers under the firm name of Pixley & McConnell. This partnership continued until the thirteenth of June, 1877, at which time, according to the testimony of Pixley, it was dissolved. But, according to the

testimony of McConnell, this dissolution was a sham; and notice thereof was published in the newspapers to induce Pixley's creditors to believe that there had been a dissolution in fact, so that they might be prevented from attaching the firm assets.

Each defendant was equally interested in having his own testimony sustained. Evidence was introduced tending to corroborate the statement of each defendant, and there were facts and circumstances testified to on each side by other witnesses, which were, to some extent, inconsistent with the testimony of the respective defendants.

Upon the testimony, it was exclusively within the province of the jury and the court below to decide the question whether the dissolution was *bona fide* or not. There being, in our opinion, a substantial conflict in the evidence, the verdict of the jury will not, upon this ground, be disturbed.

2. It is admitted that appellant suffered himself to be held out as a partner after the date of the dissolution, and we are of opinion that plaintiff's evidence shows that she was induced to deal with McConnell & Co. by reason of her belief that Pixley was a member of the firm. The record shows that, after the date of the publication of the dissolution, the business was conducted by McConnell at the same place, in the name of McConnell & Co.; that plaintiff was aware of the partnership relations existing between Pixley and McConnell, prior to the thirteenth of June, 1877; that she had no actual knowledge of the dissolution; that she never transacted any business with the firm, or either member thereof, until about five months after the publication in the newspapers of the dissolution of copartnership; that in all her transactions the same blanks were used in the business, with the heading printed thereon, "Pixley & McConnell, Stock Brokers," as were used by the firm before the date of the dissolution; that all the accounts of the purchases and sales of stock which were rendered plaintiff, show upon their face that the business was conducted by "Pixley & McConnell, Stock Brokers," and that Pixley had knowledge of the use of said blanks and consented thereto.

The evidence is clearly sufficient to sustain the verdict upon this branch of the case.

Unless the legal objections urged by appellant's counsel are well taken, the judgment of the district court must be affirmed.

3. It is claimed that the court erred in modifying the following instructions asked by appellant:

"1. If you find from the evidence that the defendant, Robert F. Pixley, was not in fact a member of the firm of McConnell & Co. subsequent to the month of June, A. D. 1877, then your verdict must be for the defendant, unless you find the said defendant, Robert F. Pixley, failed to give proper notice of his dissolution of copartnership with the defendant Isaac McConnell, and that the plaintiff was misled *to her prejudice* by such failure. It is admitted that the plaintiff never had any business dealings with the defendants until after the thirteenth day of June, 1877, the time when the defendant Pixley claims that the partnership was dissolved, therefore, general publication in the newspapers published in the town where the defendants carried on their business prior to the alleged dissolution, and where the plaintiff resided, would be sufficient notice to the plaintiff of the dissolution."

The court modified this instruction by striking out the words "to her prejudice," and by adding at the end thereof: "Provided, that knowledge of such notice of dissolution of copartnership came to the actual knowledge of plaintiff."

"2. It is claimed by the plaintiff that the defendant Pixley is jointly liable with the defendant McConnell to the plaintiff in this action, notwithstanding Pixley may not have been in fact a partner of McConnell in the stock brokerage business after the thirteenth day of June, A. D. 1877, for the reason that the old signs of Pixley & McConnell remained, and were used, after that time, at the place of business of McConnell & Co., and that the old form used by Pixley & McConnell continued, after the time of the alleged dissolution, to be used by McConnell & Co.

"In order to warrant you in holding the defendant liable on this ground you must be satisfied:

"1. That the old signs and the old forms continued to be so used with the consent of the defendant Pixley.

"2. That the plaintiff was ignorant of the fact of the dissolution, and in determining the question whether she was

ignorant or not, you are to take into consideration the fact of the published notices of dissolution, the time and manner of their publication, the place which they occupied in the paper, the greater or less notoriety of the fact of the dissolution, the plaintiff's intimacy with the family of the defendant Pixley at the time of the alleged dissolution; *the lapse of time occurring after the alleged dissolution and prior to the plaintiff's dealing with McConnell & Co.*, and all other circumstances showing the manner in which the dissolution was communicated; and if, from all these circumstances, you believe that the fact of the dissolution was likely to come to the knowledge of plaintiff, you may infer that it did so come to her knowledge, if you believe that it did.

"3. If you find that the plaintiff, before her dealings with McConnell & Co., had knowledge of the existence of the former partnership between Pixley and McConnell, and that she was actually ignorant of the fact of the dissolution, still you can not hold defendant Pixley liable, if you find that he was not a partner in fact after June, 1877, unless you are also satisfied from the evidence that the plaintiff was misled to her prejudice by the use of the old signs and forms in use by McConnell & Co. with the consent of Pixley; that is, unless you find that the plaintiff dealt with McConnell & Co., believing that Pixley was a member of the firm of McConnell & Co., *and that she would not have so dealt but for that belief.*"

The court modified this instruction by striking out the sentences we have italicized, and by inserting after the word "prejudice" the words "by her former knowledge of the partnership."

We are of opinion that the modifications made by the court were not prejudicial to the defendant. The first instruction ought to have been refused. If intended to apply to the first branch of the case, it was erroneous, because it authorized a verdict in defendant's favor, although the jury might believe that Pixley held himself out to the world as a partner. Had it contained the necessary qualification upon this point, the modification made by the court would have been erroneous.

If intended to apply to the second branch of the case, the modification was correct. The second instruction refers

exclusively to the second branch of the case, and, as given to the jury, is correct.

If Pixley, after the dissolution, consented that his name should be held out to the world as a partner, all persons, whether new customers or not, having knowledge of the previous copartnership, would be presumed to deal with the firm upon Pixley's credit as well as upon the credit of McConnell.

If the evidence satisfied the jury that plaintiff was aware of the previous copartnership, that she had no knowledge of the dissolution, that she was misled by the acts of Pixley, and induced to deal with the firm of McConnell & Co. upon the faith and belief that Pixley was a partner, then it was not incumbent upon her to show "that she would not have so dealt but for that belief."

The most important question, upon which we entertain some diversity of opinion, is as to the effect of the action of the court in striking out the words "The lapse of time occurring after the alleged dissolution, and prior to the plaintiff's dealing with McConnell & Co." The jury had the right to take into consideration all the circumstances specified in the second subdivision of this instruction, as asked by the defendant's counsel, in determining whether or not the fact of the dissolution was likely to have come to the knowledge of the plaintiff.

In some cases "the lapse of time" might, in connection with other circumstances, be very material and important: *Merrit* v. *Pollys*, 16 B. Mon. 357.

I am of opinion that, although it would have been proper to have left this clause in, the error of striking it out is not of sufficient gravity to authorize a new trial in this case. I am satisfied that the defendant was not prejudiced by the action of the court in striking it out. The controlling questions were as to the fact of the published notices of the dissolution, the greater or less notoriety of the fact of the dissolution, and the plaintiff's intimacy with the family of the defendant Pixley. In considering these questions the jury would necessarily have to take into consideration the length of time the notices were published, and all the notoriety of the dissolution after it occurred, and prior to the time that plaintiff commenced "dealing with McConnell & Co."

The instruction, as given to the jury, fairly presented the

law, applicable to this branch of the case, in such a manner that the jury could not have been misled as to their duty.

4. The court did not err in giving or refusing certain instructions upon the assumption that the value of the stocks, as alleged in the complaint, was admitted by a failure to deny it in the answer.

This court has decided that the allegation of value in an action of trover is a material allegation, and if not denied, need not be proven: *Carlyon* v. *Lannan*, 4 Nev. 156; *Blackie* v. *Cooney*, 8 Id. 41.

The complaint alleges that since the "second day of September, A. D. 1878, and before the commencement of this action, said defendants appropriated and converted to their use said shares of stock. That the value of said shares of stock *at the time of said conversion* was twenty-three thousand three hundred and ninety dollars."

The evidence shows that the stocks were converted in the month of August, 1878, prior to the time alleged in the complaint, and there was no proof offered as to the value of the stock at that or any other time.

The statement of counsel that appellant, by failing to deny an allegation that between the second of September, 1878, and the third of March, 1879, the stocks were worth twenty-three thousand three hundred and ninety dollars, does not admit that they were worth that or any other sum in August, 1878, is technically correct.

But the law is that the allegations as to the time of the conversion is immaterial, and by the failure to deny the allegations of the complaint, the defendant Pixley admitted "that the value of said shares of stock, *at the time of said conversion*, was twenty-three thousand three hundred and ninety dollars."

5. There is no error in the modifications made by the court to the second instruction, asked by the defendant Pixley relating to the question of notice and demand.

The judgment of the district court is affirmed.

BEATTY, C. J., dissenting.

I do not feel able to say that the error of the court in striking out the "lapse of time," etc., would not have prejudiced the appellant, and am therefore obliged to dissent.

GODFREY ET AL. v. WHITE ET AL.

(43 Michigan, 171. Supreme Court, 1880.)

[1] **Status of partnership lands in equity.** Lands that are part of a common partnership stock have in equity the character of personalty; and the legal title thereto is subordinated to the incidents of partnership funds and accounting.

Lands as assets. Partnership lands can not, in Michigan, be distinguished from other assets for purposes of settlement.

Jurisdiction not affected by locus rei sitæ. Proceedings between partners for an accounting, are always for the principal purpose of reaching a statement of money balances and a division of assets as personalty, and being essentially a personal and not a real controversy, may be carried on in courts within whose jurisdiction the parties live and do business, irrespective of the *locus* of the partnership lands.

[2] **Claim for personal services by partner.** Partners can not ordinarily claim allowances for services exceeding those of their associates: but where those who do not expect to be personally charged with the business of the firm perform special services, it is proper to allow them compensation beyond their share of the profits, if they had an understanding with the others that they were to be compensated for them.

Negligence of copartner. Failure in duty as a partner, may be a ground for dissolving the partnership, but not for a claim by diligent partners for compensation.

Compensation inter se not implied. An agreement to compensate can not be implied from the mere fact that services were rendered.

Interest. Interest can not be allowed at ten per cent. on an accounting, if there has been no written agreement for that rate. Advances by partners for the benefit of the business do not draw interest unless an intent that they shall do so can be inferred from usage or from circumstances, or unless it is understood by the partners that it shall be allowed.

Services of expert accountant. In a suit for an accounting, an allowance was properly made for a reasonable sum paid by complainant to a competent accountant for the purpose of arriving at an adjustment, the services being necessary and of use to all parties and therefore a common charge on them.

Partition not incident to account. Partition may be made by consent; but it is not an incident to a suit for a partnership accounting in which the partners usually have a right to have the assets disposed of. If land belonging to the firm is not disposed of, it must be left as a distinct tenancy in common so that the tenants may have it partitioned in a separate suit.

[1] *West Hickory Co.* v. *Reed*, 80 Pa. St. 38.
[2] *Levi* v. *Karrick*, 13 Iowa, 344; 8 Id. 150.

Partition affected by lex loc'. Partition is a local proceeding, and can only be enforced in a court which has jurisdiction of the territory where the land is.

Depositions signed without reading. Deponents can not waive the reading of their depositions before signing them; depositions so signed are inadmissible in evidence.

[1] **Costs.** Where all the parties to a partnership accounting appealed, and the case was so disposed of that neither prevailed rather than another, the cost of printing the record was apportioned according to the interest of the parties in the firm, and in other respects each party paid his own costs.

Appeal from the Superior Court of Grand Rapids.

Bill for partnership accounting. Both parties appeal.

NORRIS & UHL, for complainants.—A consent decree can not be materially varied without the assent of both parties: 2 Dan. Ch. Pr. 1029, n. 10; *Leitch* v. *Cumpston*, 4 Paige, 476; *Jenkins* v. *Eldredge*, 1 Woodb. & M. 61; *Clark* v. *Hall*, 7 Paige, 382; nor can it be set aside: *Harrison* v. *Rumsey*, 2 Ves. 488; nor appealed from: 2 Dan. Ch. 1459; *Coster* v. *Clarke*, 3 Edw. Ch. 405; *Atkinson* v. *Manks*, 1 Cow. 691; *French* v. *Shotwell*, 5 Johns. Ch. 564; *DeCarters* v. *La Farge*, 1 Paige, 574; *Monell* v. *Lawrence*, 12 Johns. 521; partnership real estate is regarded in equity as personal property: 1 Story's Eq. Jur. § 674; 3 Kent's Com. 37; Story, Partnership, §§ 92–4; Pars. Partnership, 207, 350; *Howard* v. *Priest*, 5 Met. 582; *Buchan* v. *Sumner*, 2 Barb. Ch. 165; *Delmonico* v. *Guillaume*, 2 Sandf. Ch. 366; the mode of keeping partnership accounts in regard to real property belonging to the partners, has weight in determining whether it is partnership property: *Fairchild* v. *Fairchild*, 64 N. Y. 477; a decree for an accounting should order a sale of partnership realty, and the distribution of the receipts: Story, Partnership, 207, 350; Pars. Partnership, 474; *Darby* v. *Darby*, 5 Drury, 505; *Stevens* v. *Stevens*, 39 Conn. 474; *Carter* v. *Bradley*, 58 Ill. 101; *Levi* v. *Karrick*, 8 Ia. 150.

BLAIR, KINGSLEY & KLEINHANS, for defendant and appellant White.

CAMPBELL, J.

[1] *Von Schmidt* v. *Huntington*, 6 M. R. 285.

The bill in this cause was filed to settle the affairs of an alleged partnership wherein the complainants claim an interest of one third, Alfred D. Rathbone one fourth and Geo. H. White and Amos Rathbone the remaining five twelfths. The other defendants have no interest in the chief controversy. The original arrangements, with slight exceptions, are not in dispute, although there is some difference of claim concerning their legal effect. The chief difference now arises out of claims for personal services of different partners, claim for interest on advances, and some special items of credits and charges. Defendant White sets up want of jurisdiction. The suit was brought in the Superior Court of Grand Rapids, and he insists the suit is local, and should have been in the Circuit Court for Kent County.

In the spring of 1865 an agreement was made verbally between complainant Freeman Godfrey, acting really on behalf of himself and his brother Silas, with defendants Amos Rathbone and George H. White, with a view to the acquisition of title to certain lands near Grand Rapids, valuable for gypsum beds, and then held in common by various owners. During that year the control of the title was completely vested in White and Rathbone. It was understood that complainants should have a third interest and pay a third of the purchase money. It was further understood that Alfred Rathbone, who was then just at the close of his minority, should have a fourth interest. In 1868 conveyances were made vesting in complainants and in Alfred Rathbone record title to those amounts.

The purpose of this purchase of lands was to develop the plaster beds and get out and sell plaster in its various shapes, rough and ground. At first there was no provision made for calcining the gypsum, but after a few years this was added to the other works. Godfrey & Brother had at the beginning, and continued to have, separate plaster mills of their own, which, although claimed by White to have been connected with the common enterprise, are to be regarded as foreign to it.

From 1865 to 1871 the business was continued without any arrangement for calcining. In that year works were set up for that purpose. From that until 1876, when this bill was filed, the business was carried on in all its branches, and exten-

sive improvements put on the land and large profits received. In July, 1876, the parties not agreeing, and failing to come to terms, this bill was filed, and the property was put into the hands of a receiver.

During all this interval the books were never balanced, and no accounting was ever had. A considerable part of the charges and credits in controversy never came into any recognized statement.

The absence of any written articles of partnership, and the failure to make any such entries as would bear upon the terms of the business, must be regarded as the cause of this litigation. Nearly all the questions we are called upon to determine should have been easily settled by the partnership books, if they had been kept as they ought to have been.

The bill set forth the partnership on the terms already referred to, carried on under the name of George H. White & Co., one object being to prevent the appearance of any common interest with Godfrey & Brother, the parties supposing an appearance of competition might help them. Complainants set out various services done by them in the business, and averred as a special ground of pecuniary allowance to them the turning over of a large amount of orders for plaster from Godfrey & Brother to the firm, for which a claim was made of $25,000, and also various other contracts with outside parties, on which similar credit was demanded. A claim was also made for personal services.

Defendants filed an answer and cross-bill admitting the common interest and business, but denying it was a partnership. These pleadings claimed that Godfrey & Brother's calcine business was to be combined with the other, and should be joined in the accounting. There were some other special allegations which need not be repeated here, but which may be referred to in another connection as far as necessary.

After issue had been joined under the cross-bill, and preparations made to ascertain the truth of some facts in it, a consent decree was made on the 9th of June, 1877, for the submission to a jury of the two main questions—first, of a partnership, and second, whether it included Godfrey & Brother's calcine business.

On July 18, 1877, when these issues came on to be heard,

a new decree was made by consent, dismissing the cross-bill, and directing an accounting to be had on the theory of the original bill. It was found there was such a partnership as there set up, "in which the interest of Freeman Godfrey and Silas Godfrey was and is one third, and the interest of Amos Rathbone, Alfred D. Rathbone and George H. White was and is two thirds."

Subsequently, in November, 1877, the court allowed amendments of the pleadings setting up claims for personal services on both sides and interest on advances, and ordered, by way of further directions, that in the accounting there should be a separate finding as to each of the defendants.

It is not very important, in our opinion, to consider the precise extent to which the parties or court could go beyond the terms of the consent decrees. It does not seem to us that either of the amendments was beyond the fair scope of the accounting. If the matters referred to had appeared on the books this would be very manifest. And while, from a technical reading of the decree, it might perhaps be claimed that the firm consisted of two members—Godfrey and brother jointly being one, and White and the Rathbones jointly the other—there can be no harm done by making an apportionment among the several defendants so far as relates to the strictly partnership business, if it will not confuse the accounts. In the present case we think this may be done, to a certain extent at least. It could not include separate interests not concerning the firm at all.

The court below in the final decree not only settled the individual interests in the assets, but required the land to be divided and partitioned in described parcels, and the remaining assets distributed in accordance with the finding of the court on the proper balances.

An important preliminary question is presented concerning the actual extent of the assets. We are called on to determine whether the real estate is partnership assets, and also whether it is to be regarded as purchased entire for the firm in the outset, or as furnished by the respective partners as their separate property, each interest being treated as several.

We have no doubt, from the testimony and from the con-

veyances of 1868, made some three years after the business was commenced, that it was intended to consider each set of tenants in common as turning in their respective interests in a fixed proportion to the general business. At that time, when there was no attempt made to balance the accounts, complainants received a conveyance of one third, and Alfred Rathbone of one fourth. There can be no doubt this showed them to be tenants in common in the strictest sense at that time, so far as the documentary title went. Whether the land was or was not to become assets for d stribution, it is quite plain that each was, so far as the firm was concerned, considered as bringing in his own undivided interest as his own property.

The cost of the property can not be treated as so much money paid out of the common stock for the common interest. If any money was paid out of the firm for that purpose, each individual to whose benefit it inured thereby became indebted separately for so much advanced him on account. In taking the final accounting each is to be treated as owning in the outset a separate interest, in the purchase of which the firm was not involved as a firm. Complainants held one third and defendants the rest, and complainants are not concerned in any dispute between defendants as to the original consideration for Alfred's quarter, or as to which of the defendants paid for it. All disputes between Alfred and the other defendants as to the state of his dealings with them, and as to the guardianship and estate accounts they were bound to settle with him as custodians of his father's estate, are outside of this controversy and must be settled elsewhere. He stands here as original owner of one fourth of the land, and entitled to one fourth interest in the business, chargeable with any moneys paid to or for him out of the firm assets, and creditable with all money advances made by him outside of the land, and with any other items of credit properly chargeable to the firm in his favor.

This being so, there is some force in the claim set up by White, that the firm merely became tenants of the land, and interested only in its rents and profits. To this view, however, there is, we think, a fatal objection.

No written agreement having been made creating any tenancy, and no term having been fixed for the continuance of

the business, it would follow from any such theory that if either party became considerably indebted to the firm beyond his share in the assets, there would be no lien upon the land against him; and in case of dissolution, the tenancy would end in such a way as to leave the firm without any security. No doubt such agreements may be made, but we do not think such was the understanding. On the contrary, the purpose of the arrangement was to expend money in permanent improvements on the land itself, all of which was subservient to the quarrying and disposing of plaster in its different forms. Money was thus expended out of the common earnings as well as advances in successive years, and no difference was made in the accounts between funds used for one purpose and those used otherwise, and nothing in the accounts would indicate that any person drawing more than his share at any time would peril the security of the rest on the land for his deficiency on a final accounting. If all these persons were really partners, as the consent decree indicates, it is impossible to suppose the lands were not understood to be part of their common stock.

This being so the realty becomes in equity impressed with the character of personalty, and the legal title is subordinated to the incidents of partnership funds and accounting. In the present case, the fact that the parties are all living removes some complication in settlement, but it has always been the law of this State that partnership lands can not be distinguished from other assets for purposes of settlement. The authorities in Michigan are referred to in *Merritt* v. *Dickey*, 38 Mich. 41, where it was held that a surviving partner was entitled to the proceeds of the sale of his deceased partner's interest in partnership lands, disposed of by an administrator, and that having bid off the interest himself for a considerable sum, without paying the price to the administrator, bondsmen of the latter could not be held liable for the failure of the administrator to demand or collect the bid, the remedy of the estate being against the surviving partner, as such, to compel a faithful settlement of the firm business out of the assets, all of which he was entitled to control. See also *Davies* v. *Games*, 12 Ch. Div. 813. This doctrine becomes more especially important as bearing on the question of jurisdiction. Defendant White claims that the controversy is one concerning lands, which he insists is local under our statutes, and

therefore not cognizable in the Grand Rapids Superior Court, because none of the land is in the city.

Proceedings between partners for an accounting are always for the principal purpose of reaching a statement of money balances and a division of assets as personalty. It may, no doubt, in some cases, turn out that there is enough pure personalty to settle all balances without reference to such lands as are owned by the firm, so that if parties choose they may keep the lands separate. But this can not usually be known until the accounts are taken; and unless the lands are kept out of the accounting altogether originally, by general consent, there must be some difficulty in treating them as distinct at any time. It would be contrary to all principle to hold a court capable of maintaining jurisdiction up to the last stage of a cause, and then incapable of completing its work over any part of the property in controversy. Partnership settlements can not very well be made piecemeal. The court that deals with them must determine all of the equities. The proceeding is in its essence a personal and not a real controversy. It could hardly be claimed that a partner could get an accounting in any State or region where lands were to be found, and proceed to a decree without personal service or appearance, and without a personal accounting. The decree when it reaches lands does it incidentally, and its chief purpose is different.

By section 5058 of the compiled laws it is provided that if the subject matter of the suit is local, the suit must be brought in the county in which the property in dispute is situated; but if not local, in the county where some party resides, if either is a resident of the State. By section 13 of the act of 1875 regulating the jurisdiction of the Superior Court of Grand Rapids, its equity powers were allowed to be exercised in close analogy to those of circuit courts. It wa declared it should have "the same jurisdiction as the Circuit Court for the County of Kent, in all cases in equity in which any complainant or defendant shall be a resident of the city of Grand Rapids, or in which the subject-matter of such suit shall be situated or located in said city," etc. Laws of 1875, p. 44.

If the subject-matter of this suit could be regarded as local, and confined to the land, the suit was improperly brought in

the superior court. But as all the partners lived in Grand Rapids, and kept their place of business there, that court clearly had jurisdiction if the suit is not local. We have already indicated our views on that question. We do not think the objection to jurisdiction can be maintained. The case of *Harris* v. *Fleming*, 1 Ch. Div. 208, is a very recent decision, where jurisdiction was maintained in England concerning a partnership in mines in India. While there were some other questions presented, the case was mainly put upon its character as intended to reach partnership dealings. Such, we think, is the sensible view of this class of litigation. The questions, therefore, which we are to determine, relate entirely to the accounting, and to the disposition of the assets and balances.

The decree required a payment to each partner in money, by the receiver, of a sum mentioned in it, and then after ordering a sale of the personal assets, directed the proceeds to be divided ratably, according to the proportions of the several partners. The real estate was partitioned in specified parcels.

In settling the separate accounts the firm was adjudged to owe complainants $13,871.40; to Alfred Rathbone, $11,011.57; to Amos Rathbone, $5,412.94½; to White, $8,783.94½. If this computation is correct, it would have been much simplified by reducing the shares payable to each partner by what he would be bound to contribute toward paying these debts, which would result in requiring $1,241.61 to be paid to Alfred Rathbone, $844.78 to complainants, and $342.30 to be paid to White, making an aggregate of $2,728.69 to be paid out of the share of Amos Rathbone. This would have simplified the division and balanced the accounts. But inasmuch as these results are complained of by all the parties, and must be changed in some respects, at least, we need not further dwell on them.

In making up the decree the court below allowed claims for services in favor of Freeman Godfrey, Alfred Rathbone and White.

Complainants are allowed for the services of Godfrey $6,500. Alfred Rathbone was allowed $13,500. White was allowed $4,800.

The commissioner, in his accounting, allowed to Godfrey $11,395.23; Alfred Rathbone, $16,933.33; and to White

$3,516.66. The court increased White's allowance and reduced the others.

One main question in the case arises out of these allowances. Without now going into full particulars it may be said that the record shows Godfrey's services were chiefly in planning and looking after the improvements, and giving the benefit of his own personal experience in seeing to the general course and development of the plaster business.

White, attending more particularly to financial arrangements, Alfred Rathbone was book-keeper and general clerk in charge. Both White and Godfrey claim to have rendered services in building up a run of custom.

White claims that none of the firm should be paid for personal services, but insists he should be if the rest are. Godfrey claims each was to be paid for what he did, but disputes the amounts to be allowed.

This question is attended with some difficulty. In ordinary partnerships it is very clear that no partner can claim allowance for his services, whether greater or less than those of his associates: *Heath* v. *Waters*, 40 Mich. 457. Unless there is a distinct agreement for another rule it is not to be doubted that what each one does for the common good is done gratis. When partners unite their fortunes it can seldom be expected that each is as valuable to the firm as every other. And so long as the firm lasts no premium is given to the more useful members, and no deduction is made for incapacity or absence of any one. The venture is made to reach general results, and nothing more is contemplated. Failure in duty may be a cause of dissolution, but it is no ground of compensation to the diligent.

In the present case the partnership differs in some respects from ordinary business. The principal members, that is, the Godfreys and White and Amos Rathbone, were engaged in other pursuits, and did not expect to make this their personal charge. The work to be done at the mill and quarry was expected to be done by subordinates, subject to at most a very general oversight. The sale of plaster required no more than some effort to control custom. One of the means of getting custom, as agreed u on, was that Godfrey & Brother should not be publicly known in the business at all, so that to the

world at large it would seem that they had a rival business, and through that apparent rivalry the idea would be created that prices would be kept down by competition. It is plain that neither White nor either of the Godfreys was expected to spend very much time in the ordinary management of the business, and that neither of them did so. It is also evident that White was ostensibly the head of the firm, and the Godfreys did not appear in it, and naturally White would have more calls upon him than they would. Freeman Godfrey was, however, regarded as best qualified to get the works in running order, and White—for Rathbone & White—had in the outset a good deal of financial care and management. It would not have been very strange if these things had led to an agreement to pay each for his special services. But, while the testimony contains more or less to indicate that at the end of the business such a claim was set up in apparent good faith, we can not satisfy ourselves that any such agreement was ever made. We think the conduct of the party fails to make it likely. It is not claimed that there was ever any agreement that these persons should perform specific services, or in what way or to what extent allowance should be made for them. It will not do to assume that any partner might, when he saw fit, use his own judgment in performing services and then charge for it. Neither could such an agreement contemplate any salary to be continuous. It would only cover different and specific acts. We find proof that Freeman Godfrey did some work that no other member of the firm could have done. Had it been done by an architect or foreman, the price paid would have been but a reasonable percentage at best. But no charge was ever made of it, and no attempt was made at the time to keep any account of it. The same is true as to such services as White rendered. Neither of them ever consulted the rest as to whether such work should be regarded as subject to compensation, and neither of them ever kept any data which would enable any one to tell what it was worth. It does not appear clearly, if at all, that what they did for the firm interfered with their outside business. We do not think any such allowances should have been made.

Alfred Rathbone's case is different. There is very little doubt that there was an original understanding, although a vague one, that he was to be steadily employed, and be paid.

He was actually so employed, and in the absence of written evidence, the continuous course of business is important in explaining the understanding of the parties. He had no such peculiar knowledge of the business as to show that his personal skill or judgment entered into the reckoning. Upon these matters White and Godfrey were more useful. The duties which Alfred performed were not such as a partner would have been expected to perform as such, rather than any other person. He was employed, in fact, as no more than a general clerk, and in the absence of any other agreement it can not be supposed he was to have, beyond his share in the profits, any more than a clerk's wages, which would have been paid to some one else if he had, like the other partners, attended to his own outside affairs. It appears that in their attempt at a settlement before this bill was filed an agreement was provisionally made as to the value of his services, fixing them at $800 a year for the first two years, and $1,000 a year thereafter. We have some doubt whether he earned $800 a year at first. But, making due allowance for the delays in starting, we think ten years may be regarded as a period of his labor of any value, and that he should be allowed $9,600, and no more. There is no satisfactory evidence that this is not full pay for such services as he rendered different from those of the other partners. The court below, we think, allowed too much to Alfred Rathbone, and should have made no allowance for services to the others.

Complainants were allowed by the commissioner, but disallowed by the final decree, large items for orders for plaster and plaster contracts, which they turned over to the firm instead of filling themselves. These, they insist, were valuable and profitable, and therefore entitling them to remuneration.

Of their value there is no doubt, and they would have been a good consideration for an agreement to make some compensation. We do not find, however, that any understanding was had to that effect, and we think none can be implied from the mere fact that the services were rendered. There are several things in the case that indicate that without proof of a very clear understanding to that effect, it would be unreasonable to suppose any compensation would be regarded as allowable. A certain mystery was kept up concerning God-

frey & Brother's connection with the partnership, and business was divided with the evident purpose of keeping up the mystification. There was also, as appears from some testimony, a fear or jealousy entertained occasionally, lest one firm might undersell the other without conciliation. To persons not themselves interested, it is not easy to appreciate the hidden purposes which actuated all these parties in their dealings. But a merchant who sends his own customers, for a specific purpose, to a neighbor, does not thereby get any claim on him.

A claim is made on behalf of White and Amos Rathbone for interest on advances made in 1865, 1866 and 1867 beyond their share in the business. Some items cover still later years, but the sums are less important. The commissioner disallowed the interest. White only excepted on this account. Amos Rathbone excepted on some other questions, but not on this. The exceptions rest on two claims—one for interest at ten per cent., and one for interest generally. Both were disallowed by the superior court. There was no written agreement, and therefore no foundation for any allowance of ten per cent. It is claimed that at the abortive attempt at settlement in 1876 a computation was made at this rate, and received sufficient recognition to make it equivalent to an agreement in writing. Giving that transaction all the force that can be claimed for it, it was never agreed upon as a binding account, and was at most but one of the things considered and passed by without a conclusion. But we do not think there is enough in the case to show that on that occasion there was any understanding whatever concerning the allowance of interest. Some figuring was done, which would have been considered with the other matters if the parties had finally settled. But White himself was active in avoiding a complete arrangement, and nothing done on that occasion amounts to any more than a circumstance bearing with more or less weight on the understanding of the parties. We do not think it appears that the items of account were at that time so scrutinized as to throw any light on this question.

The allowance of seven per cent. would be the proper one, if any allowance at all is made. If any considerable advances were made, with the expectation of interest, there could be

nothing out of the way in having such an understanding. But while there are some circumstances which might make it apparently just to allow interest, we are not satisfied, upon a consideration of the whole case, that any error was committed by the court or commissioner rejecting it.

It is not claimed, and it is not shown that there was any understanding on the subject when these advances were made. When there is no agreement on the subject it seems pretty well settled that there must be something in the usages of business, or something in the surroundings of the parties, from which such an intent would naturally be inferred. It would be contrary to equity to lay such a charge on partners, unless they either knew, or ought to have known, that it was to be enforced against them. They may not wish to become such borrowers. While interest is incident to a very large class of transactions, it is only chargeable in very many of them by way of damages after the debtor is in default for not paying his creditor. The very large amount of money deposited subject to check in our banks represents a quantity of capital which sometimes equals or exceeds the active investments in the same communities for longer or shorter periods. Very few banks allow any interest on deposits subject to call. The same thing is true with regard to a great many dealings in commercial ventures. And the rule which requires something beyond the mere advance by a partner to entitle him to interest is not unreasonable.

The fact that Amos Rathbone, who is equally interested with White, makes no such claim, is entitled to some weight in construing the dealings of the partners. But aside from this, the course of book-keeping is not consistent with it. As already suggested, the large advances were made early. Whether the business was or was not at that time in condition to reimburse them, a period soon arrived when there could have been no such difficulty. It could hardly be assumed that the firm would care to retain a large debt on interest either at seven or ten per cent. indefinitely. No attempt was ever made to determine on what sum interest ought to be charged, and no interest account was ever charged or made up. No trace of such a claim is found. If there had been any basis for such a claim, it ought certainly to have

been placed where the firm would know it was set up, and could admit or contest it in time to save loss and complication.

The record and the argument on White's behalf give us no satisfactory means of knowing the proper extent of such a claim if valid. The balances as finally struck have rendered an awkward method of accounting harmless, but it seems to us that if the accounts had been correctly drawn out to begin with, this question would appear differently. The charges made by Rathbone & White evidently treat the money paid for the land and not the land itself as the original capital. Many of the payments on which interest is claimed were purchase money payments. We do not see from the record that Godfrey & Brother did not pay, at one time or another, the price of their one third interest. Whether Alfred Rathbone has fully paid for his, concerns the private dealings of the defendants and not the firm. Leaving the land payments out of the question, the amount of advances becomes much diminished, and much less likely to have been deemed entitled to interest. But, whatever the amount may have been, the case does not show that any one expected it would be regarded as a loan to the firm for any period, or at any rate of interest. Until some such idea was suggested, or some such claim asserted, it was not incumbent on complainants or Alfred Rathbone to suppose the advances were made except to suit Rathbone & White's convenience. They never asked to have the money refunded, and they never made interest claims, and they do not bring themselves within any doctrine which would put the other partners in the wrong for objecting to the allowance of interest.

White also complains because he was charged individually with a purchase of plaster which he paid for out of firm money, amounting to $1,429. We think this was clearly shown to have been a private speculation. And upon a few other items brought out on the argument, but not very earnestly urged, we are not disposed to disturb the conclusions, which we think were warranted by the testimony.

An item disallowed by the superior court for $125 paid by complainants to Mr. Goldsbury for examining the books and getting balances should, we think, have been allowed. This

was done in 1875 and the beginning of 1876, partly in concert with Alfred Rathbone. It is evident that from the manner in which the books were kept—although no doubt fairly kept—there was a good deal of difficulty in knowing just how matters stood. The balances had not been made up at all in the usual business way for about nine years. It was perfectly reasonable that any partner should desire an adjustment, and it was also reasonable that complainants should have some voice in procuring a competent accountant to do it. The work was done openly and not clandestinely, and the assistance of Alfred Rathbone was asked and given, and the results were of utility to all the firm. The preparation was necessary, and some one else would have been employed to do it if Goldsbury had not been. If not, we think some confusion would have been created. We think the expenditure may justly be considered as a common charge. We do not think it necessary to change the decree upon amounts and balances except as indicated heretofore.

But we do not think the decree for partition can be sustained. If all the parties had consented to it, the decree might not be objectionable, because partition can be made by consent. But partition is not an incident to a suit for accounting, and the partners have a right usually to have the assets disposed of, if they choose. If not disposed of, all that could be done would be to leave the land as a distinct tenancy in common, so that the tenants could have it partitioned in a separate suit if they should see fit. It is difficult to maintain a partition in such a case as this, unless on the theory that the court having an equitable jurisdiction to give partition generally, it may be done to avoid circuity of action.

Supposing such a practice permissible, upon which we need not decide, the Superior Court of Grand Rapids has no separate and original jurisdiction in partition outside of the city. Partition is unquestionably a local proceeding, and the circuit court is the only court of equity able to enforce it.

The land should be sold and the proceeds divided.

There is one matter to which we feel constrained to refer with surprise. Several witnesses, and among them several of the parties, are stated by the commissioner to have waived the reading of their depositions before signing them. The

integrity of these gentlemen is not denied, and both commissioner and counsel seem to have supposed the practice correct. Except for the failure of any one to move to suppress, all this testimony must have been rejected. It is in no sense sworn testimony, any more than if they had signed affidavits in blank. It is merely the certificate of the commissioner that so far as he remembers they swore as he has certified. Where it appears on the face of a deposition that the party signing it does not know its contents, it exhibits a degree of carelessness in regard to the solemn obligation of an oath which has been, with how much truth we do not know, attributed to custom house oaths, but which we never saw before, and hope never to see again in the course of justice.

The reductions in the a lowances will take from complainants $5,875, from White $4,800, and from Alfred Rathbone $3,900.

This will leave their respective claims against the firm as follows: Complainants, $7,996.40; Amos Rathbone, $5,412.94; White, $3,983.94; Alfred Rathbone, $7,111.57.

The Superior Court, in order to avoid confusion, reduced the cash payments to each partner on his indebtedness against the firm by deducting $24,000 from the aggregate as made up and scaling down each share by its ratable proportion. The decree thus distributed actually about $15,000 on debts before dividing the balance. Under the present reduction a similar scaling may be made by deducting $1,000 for each twelfth share, so that complainants will be paid in cash in the first instance, by the receiver, $3,996.40; Amos Rathbone, $2,912.94; White, $1,483.94, and Alfred Rathbone, $4,111.57.

The decree must therefore be modified so as to require the payment of these sums in the first instance, and the distribution of the remaining assets must be made as soon as practicable in the proportion of each partner's interest in the firm. The lands must be sold by the receiver at public auction, on a notice of not less than six weeks, in a Grand Rapids newspaper, and the sale must be in parcels, according to the same division attempted to be made by the original decree by partition. Any partner bidding may pay for land struck off to him by allowing on the purchase so much of the proceeds of the aggregate sales as would fall to him on distribution.

As the changes in the decree operate so as to make it impossible to say that one appellant had prevailed rather than another, the costs of printing the record will be apportioned according to the interest of the partners in the firm, each party in other respects to pay his own costs.

The decree will be modified accordingly.

The other justices concurred.

LE FEVRE V. CASTAGNIO.

(5 Colorado, 564. Supreme Court, 1881.)

[1] **Interest in profits as means of compensation.** Interest in profits does not necessarily make a person a partner or liable as a partner. If interested in the profits of a mine only as a means of compensation, he is not a partner. In such case his interest is not a property in the profits as such, but a claim against them as a fund out of which, when ascertained, he is to be compensated.

[2] **Evidence—Admissions of agent.** In a suit against copartners for wages, the declaration of a party in the employ of the defendants as to the intention of one of the defendants to pay in a few days is not competent evidence unless his agency for that purpose is first established.

Appeal from the District Court of Ouray County.

Castagnio brought this action for work done by himself, Collitto and Wensen (the two latter having assigned their claims for work to Castagnio), against Moffett and LeFevre as partners. A verdict was rendered in favor of the plaintiff in the district court and judgment entered, from which Le Fevre appealed to this court.

The complaint alleged that in October, 1877, Le Fevre and Moffett were partners, working the Yankee Boy mine under lease, and while so working as partners, plaintiff and his assignors entered into a contract with LeFevre and Moffett to work on the mine. That they did the work, and that of the amount earned a certain amount was due and unpaid.

The defendant Moffett answered, admitting that plaintiff and his assignors worked for himself and Le Fevre; that the amount claimed was earned, but that plaintiff and his assign-

[1] *Darrow* v. *St. George*, 8 Colo. 592.

[2] *Alexander* v. *Cauldwell*, 5 M. R. 650.

ors expressly contracted that they would not hold him and Moffett personally for their wages, but they would look to the ore mined for their pay and have a first lien on the ore mined therefor. He further averred that the lease on the Yankee Boy mine, under which he and Le Fevre worked, expired in July, 1878; at that time their partnership ceased; that at the time there was ore on the dump, and tools, furniture and provisions which were partnership property, sufficient to pay the said claims; that Le Fevre took possession of them, and asks that Le Fevre be compelled to satisfy the claims out of the ore, etc.

Le Fevre in his answers, among other things, denied the partnership *in toto*, and further denied that as a partner, or individually, he employed plaintiff or his assignors, or that they, or either of them, ever did work for him individually or as a partner.

The agreement between Moffett and Le Fevre, adverted to in the opinion of the court, was as follows:

"This agreement, made and entered into this twenty-third day of October, A. D. 1877, by and between Robert W. Moffett, of the county of Ouray and State of Colorado, and Leon Le Fevre, of the county of Hinsdale and State aforesaid, witnesseth: that the said Rob't W. Moffett, on or about the 5th day of October, 1877, leased for the term of one year, from the owners thereof, the mining claim or lode known as the 'Yankee Boy,' situate in Mount Sneffles mining district, Ouray county, State aforesaid, for the purpose of working and taking ore therefrom; and that being without the means necessary to work to advantage the said mine, in consideration of the covenants on the part of the said Le Fevre to be performed as hereinafter provided, hereby agrees to pay to the said Le Fevre one fifth of all the profits that may be derived from working said mining claim during the time of his lease aforesaid; that is to say, from the 5th day of October, 1877, to the 5th day of October, 1878; and the said Rob't W. Moffett further agrees with the said Le Fevre, that he will deliver to said Le Fevre all ores that shall be taken out of said mine on the dump thereof, on the terms hereafter named, until all sums that may now be due, or that may hereafter become due to said Le Fevre for advances made thereon, shall have been fully repaid; and the said Moffett agrees and binds himself

not to sell, remove, or in any way dispose of any ores from said mine until all such advances as are herein provided for shall have been fully repaid. And the said Leon Le Fevre hereby agrees to furnish the said Moffett, for the purpose of enabling him to advantageously work the said mining claim, the sum of twenty-two hundred dollars, or the equivalent thereof, in such merchandise or supplies necessary to the working of said mine, as he, the said Moffett, may desire; *provided*, that the said sum shall include the cost of transportation from the place where such merchandise or supplies may be purchased, to the said mine. And the said Le Fevre further agrees that he will receive on the dump of said mine, all ore that may be taken therefrom, transport the same to the town of Lake City, where the same shall be properly sampled, and that he will, after deducting the necessary cost of transportation, account to the said Moffett therefor, two cents higher per oz. than the term of the schedule of prices received this day from the Ocean Wave Mining and Smelting Company of Lake City, dated September 1, 1877, which schedule, marked "A," is attached to, and is hereby made a part thereof; and that so soon as he shall have received ore aggregating in value the full sum of twenty-two hundred dollars, he will advise the said Moffett thereof; and it is hereby mutually agreed, that after the amount of the said advances shall have been repaid as above provided, all ores taken from the mine during the term of this agreement shall be disposed of to the highest bidder for cash. And the said Moffett hereby agrees that during the term of this agreement he will keep and preserve a true and correct account of all receipts and disbursements for and on account of the said mine, and that he will afford to said Le Fevre at all reasonable times access thereto, and that the same shall be used in determining the amount of profit that may be made, and that being in charge of said mine, will conduct the operations thereof with the greatest possible degree of economy.

To all of which the said parties hereto, hereby bind themselves, their heirs, administrators and assigns, jointly and severally by these presents.

In witness whereof, they have hereto affixed their hands

and seals, at the town of Lake City, county of Hinsdale and State aforesaid, this, the day and year first above written.

R. W. MOFFETT. [SEAL]
LEON LE FEVRE. [SEAL]"

The agreement entered into in July, 1878, and referred to in the opinion of the court, was as follows:

"This agreement made and entered into this 5th day of July, A. D. 1878, by and between all the parties, whose names are hereto attached

Witnesseth: That whereas, now there is due and unpaid to the following persons the amounts following their respective names, for work and labor done on the Yankee Boy lode, situated in Mount Sneffles mining district, in Ouray county, State of Colorado, to wit:

S. R. Adams, $18.25; D. D. Shea, $390.24; John Kimberlin, $45.62; B. A. Toler, $47.77; Dan. Beaton, $544.74; Ed. Maginnis, $608.10; John Castagnio, $678.32; William Moher, $606; A. Butler, $45.75; C. W. Smith, $385.01; W. L. Morrison, $29.40; Joseph Wensen, $574.45; Antonio Collitto, $140.34; Nelson Peterson, $225.55; Gates Avery, $79.00; H. H. Closly, $13.25; Leon Le Fevre, $6,000.00; J. N. May, $94.50; J. C. Anderson, $86.00.

Said amounts being due from one R. W. Moffett for said work and labor; and whereas, the said parties instituted suit against the said Moffett for the recovery of said amounts, and having had certain ore attached in aid of said suits, and all parties being desirous of selling said ore to the best advantage, it is here mutually agreed by the parties hereto, that said suits so instituted as aforesaid shall be held in abeyance, and that one A. G. Siddons shall be, and is hereby, in consideration of certain money by him to be raised, appointed and authorized to take possession of all said ore, and dispose of the same for the best market price, at Lake City, in Hinsdale county, State aforesaid. But the said Siddons shall first have said ore brought to Ouray and sampled and assayed, furnishing to any one of the parties thereto, who may be designated by the others, a duplicate of such samples or assays; and whenever the said ore is sold by said Siddons, and returns are made to him for the same, he shall pay out the proceeds thereof to the said parties whose names are hereto attached, save to himself, as follows, to wit:

First. Upon the delivery of this agreement, he shall pay to all of said parties, save and except the said Le Fevre, twenty-five per cent. of their respective claims, as above designated.

Second. Whenever a sufficient quantity of ore is delivered to said Siddons that will justify him in making another payment of fifty per cent., he shall pay the same out in the manner following: To all of said parties twenty-five per cent. on the amount on their original claims, and to the said Le Fevre a like amount of money.

Third. Whenever said ore is all disposed of, or as fast as a sufficient quantity is disposed of to justify demand of twenty-five per cent., another dividend of ——— shall be declared and paid, and one half of said dividend shall then be divided equally between all of said parties save Le Fevre, in proportion to the amounts of their several claims; and the other half of said dividend shall be paid to the said Le Fevre.

It is agreed that the said Siddons shall thus continue to pay out of the proceeds of said ore, until all of said claims are paid in full, or until said ore is entirely disposed of.

The said Siddons shall be permitted to deduct from the money derived from the sale of said ore, all just and reasonable expenses and charges attending the transportation, assaying and cost of delivering of said ore, dividing the net proceeds as aforesaid.

And it is further stipulated and mutually agreed that any one of the parties hereto, designated by the others, shall, at all times, have full information from said Siddons in respect to the sale and disposition of said ore, and be at all times permitted to take samples of said ore, as the same is brought down to Ouray, and have the same assayed.

If, when all of said ore is disposed of, any amount shall remain due and unpaid to any of the said parties, this agreement shall be without prejudice to his right, to take a judgment against the said Moffett for the balance unsatisfied.

It is further agreed that when the said money shall be paid by the said Siddons, he shall return ten per cent. of the several amounts, save and except the said Le Fevre, and pay the same to M. S. Taylor for legal services."

Signed by Leon Le Fevre and eighteen others.

During the progress of the trial Castagnio, while being examined as a witness in his own behalf, was interrogated by his counsel and answered as follows:

"Q. Did you ever have any conversation with the man Perdue in regard to his connection with the mine?

A. Yes, sir.

Q. You may state what it was.

To the asking of which question and the giving of this conversation, the defendant Le Fevre objected, for the reason that it was hearsay and the conversation of a third party, and the alleged agency had not been established. But the court overruled this objection and permitted said conversation to be given, to which ruling of the court the said defendant then and there excepted.

A. Why, one time he was up—one afternoon he came down here—there was a break in one of the trucks and he had to get jacks up there, and he was coming up along there, and when he got up there in the afternoon he said he was tired, when some of the boys said they did not want to work all winter without getting any money; and he tell me he was there for the business to see about that ore, to see how the business go in the mine; he was there as Mr. Le Fevre's agent, and he said Le Fevre would be up here in a few days and would pay you. He said he expected Mr. Le Fevre every day. He said nothing more at that time, and for a good while afterward. I commenced work on the last contract, and about a week before I got through I asked Jack Perdue for my pay. A week or ten days after that I quitted work and he told me he was sorry, and that as soon as he got those sacks full of ore and taken down he would have money enough to pay all the men; and I said I would wait until Le Fevre came over. One day after that I came down in town, about the 20th of June, and asked Jack Perdue what was the prospect for getting my pay, and he showed me a letter from Le Fevre. I gave the letter back to Jack Perdue and do not know where it is now." * *

T. M. PATTERSON, E. L. CAMPBELL and M. B. GERRY, for appellant.

J. W. MILLS and J. P. CASSEDY, for appellee.

ELBERT, C. J.

This was an action brought by the appellee against the appellant and one Moffett, seeking to charge them as partners.

Moffett admitted and appellant denied the partnership. The written agreement between appellant and Moffett did not, in our opinion, constitute them partners either *inter se* or as to third parties. From the recitals of the agreement it is clear the parties themselves did not contemplate a partnership. Moffett had some time prior thereto leased the "Yankee Boy" mine for the purpose of working it, but was without the necessary means to work it to advantage. For the purpose of enabling Moffett to work his mine, the appellant agreed (upon the terms set forth) to furnish him with money or supplies to the amount of twenty-two hundred dollars. In consideration of these advances, Moffett agreed to pay Le Fevre one fifth of all the profits derived from working the mine during the term of the lease. To secure Le Fevre in his advances, Moffett further agreed to deliver to him all ores taken out of the mine on the dump, until Le Fevre should be repaid all his advances.

This is the substance of the agreement, and is the common case of a merchant or other person making advances of money or goods, or both, to enable a miner to work his mine.

Le Fevre had no interest in the lease, nor any control over the working of the mine. Limitedly he controlled the ores mined, but only for the purposes of securing his advances.

It is insisted, however, that sharing in the profits made him, as matter of law, a partner as to third persons.

Interest in profits does not necessarily make a person a partner, or liable as a partner. Parsons on Partnership, *67. To have that effect, it must be, as the books express it, an interest in profits as profits—a proprietary interest, or, as Mr. Justice Clifford says, in *Buthold* v. *Goldsmith*, 24 Howard, 537, "the party must be in some way interested in the profits as principal." Or as expressed in *Harvey* v. *Childs*, 28 Ohio St. 319, "the evidence must show that the persons taking the profits shared them as principals in a joint business in

which each has an express or implied authority to bind the others."

Where a person is only interested in the profits of a business as a means of compensation, he is not a partner. In such case his interest is not a property in the profits as such, but a claim against them as a fund out of which, when ascertained, he is to be compensated.

Mr. Parsons says: "A mere payment or promise to pay out of the profit a sum of money as a specific proportion of the profits, does not necessarily constitute the payee a partner, and gives him no interest *in* the profits and no right *to* the profits, but only a personal claim against the promisor for such money or for such a share of profits after they are ascertained, and may be divided." * * * The words which the parties use, and all of them, and all the parts and provisions of their agreement, as well as its general character and their relation to each other, are to be looked at, and if the whole evidence leads to the conclusion that the receiver of money took it in good faith, only as wages, or specific compensation or payment, and did not intend to acquire any interest in or any control over the business, or in the profits as they accrue, and before they are ascertained and divided, but only after they were ascertained to find in them the fund, and in their amount the measure of his payment, he is no partner nor liable as such. Parsons Part. *71 and notes.

Again he says, after reviewing all the leading authorities upon this subject: "On the other hand, we think that, notwithstanding *dicta* of immense weight apparently to the contrary, the cases show that there are but two grounds upon which a man can be liable as a partner to third parties, and that is, if a man has not been held out as a partner, he can be chargeable as such only when he holds that relation to profits, which we believe to be the ultimate test of partnership, both *inter se* and as to third parties; that is, unless he has some ownership in or of the profits *as they accrue*, and are not yet ascertained and divided into portions." Parsons Part. *71, note *l*.

In *Richardson* v. *Hughitt*, 76 N. Y. 55, the court, in speaking of the profit test, says: "And here comes another exception to the rule last stated, which is, that when the person has

no interest in the capital or business, and is to be remunerated for his services by a compensation from the profits, or measured by the profits, or what is to depend, as in case of seamen or other voyagers, upon the result, it has no application. Where, then, one is only interested in the profits of a business as a means of compensation, he is not a partner."

The agreement in question, while it stipulates that the appellant is to be paid one fifth of the profits, falls clearly within the exceptions to the rule that interest in profits involves liability as a partner. Its leading recitals and terms show its true character to be a mere contract to advance money or supplies, not as an owner, but as a creditor, relying on the ores to repay his advances, and on the profits as a fund for a compensation in lieu of interest.

The court below correctly instructed the jury as to the true character of the agreement, but left it to the jury to find whether the appellant had held himself out as a partner in such a manner as to render him liable. There was substantially no evidence to support this theory of the case, on the contrary, it appears that the appellant lived and did business in another county, and from the date of the agreement between Moffett and the appellant in October, 1877, until about the 10th of July following, when the mine was closed, the appellant never visited the mine, nor does he appear to have exercised a single act of control in its management.

When, in July, the disorder of Moffett's affairs demanded his presence at the mine, he found it closed, and the appellee and other workmen in possession of and guarding the ores which they had attached for their wages.

The agreement which was then entered into by the appellant, the appellee and the other workmen, in regard to the disposition of the ores for their common benefit, affords a strong presumption that at and prior to that date the appellant had not been thought of as a partner. In this agreement he is scheduled as a creditor entitled to share the proceeds arising from a sale of the ores, and Moffett alone is mentioned as the debtor.

The testimony touching the declarations of Perdue was of declarations touching payment and not partnership, and if anything, was an undertaking to pay the debt of a third person.

This testimony, however, was not competent, as Perdue's agency for any such purpose was not established. The court erred in admitting it.

A careful examination of the record shows no evidence to support the verdict of the jury, and the court below should have granted the motion for a new trial.

The judgment is reversed, and the cause remanded.

Judgment reversed.

FLINT, JOHNSON & CO. v. EUREKA MARBLE CO.

(53 Vermont, 669. Supreme Court, 1881.)

[1] **Arrangement between quarry and marble mill—Test of partnership—Book account for indorsements.** The defendant company was the owner of an undeveloped marble quarry, and plaintiffs were its principal stockholders. The company contracted to quarry, deliver on the cars and pay one half the cost of removing the marble to plaintiffs' mill; the plaintiffs were to manufacture it and divide the avails equally. The company credit becoming poor, the plaintiffs had to indorse its paper in order to enable it to keep up the supply of marble. *Held*, that there was no partnership as there was no community of profit and loss. By the arrangement one might gain and the other lose. 2. That in an action on book account the mill men could recover the moneys actually paid under their indorsements; but not for indorsements outstanding.

Request to indorse implied. The knowledge and acquiescence of a defendant in the indorsement of its paper by a third party, to the benefit of defendant's credit, is evidence from which a request to indorse may be inferred.

[2] **Contract between corporation and stockholders.** A contract between a corporation and parties owning a controlling interest in the stock the court will carefully scrutinize, and may refuse to enforce its unjust provisions.

Case heard at the March term, 1880. Action, book account. Judgment, *pro forma*, was rendered upon the report of an auditor for the plaintiff to recover the sum of $16,833.63. The exceptions were allowed and certified by the first assistant county judge, Hosea B. Ballou, presiding, as the judge of the Supreme Court holding this term was disqualified by

[1] *Rutland Co.* v. *Ripley*, 3 M. R. 291.

[2] *Twin Lick Co.* v. *Marbury*, 3 M. R. 688; *Merrick* v. *Peru Co.*, Id. 583.

reason of having been of counsel. The auditor found, among other things, as follows:

The Eureka Marble Company was incorporated in 1866 and organized soon afterward. The company purchased a marble quarry in Rutland, where they have done their business since 1867. On the 17th day of February, 1871, said corporation contracted to lease their quarry and lands connected with it to George Hart, of Boston, Mass., J. G. Flint, of Milwaukee, Wis., William H. Johnson and George H. Babbitt, of Bellows Falls. And at the same time entered into a contract in writing, by the terms of which the Eureka Marble Company was to furnish blocks of marble from their quarry to said Hart, Flint, Johnson and Babbitt; and they were to saw the same, market the marble, and after deducting the expenses of collecting, pay to the Eureka Marble Company one half of the proceeds of such collections.

In April, 1871, the copartnership of Flint, Johnson & Co. was formed, the members of whom were said George Hart and J. G. Flint, Wyman Flint, William H. Johnson and George H. Babbitt. All these partners were stockholders in said Eureka Marble Company, the Flints owning one hundred shares, Johnson and Babbitt fifty shares. Hart owned and held as collateral and controlled something over fifty shares. The number of shares of said company was four hundred.

No special request was ever made by the Eureka Marble Company to Flint, Johnson & Co., for the indorsement of its paper or for the payment of the indebtedness of the corporation or the furnishing of the materials charged in their specification. The business was all done and controlled by said copartnerships. But I find that said corporation understood and knew the manner in which the business was conducted, and never objected to the action of the copartnership. If, from the acquiescence of the corporation in the indorsement of its paper and payment of the same, the employment and payment of the workmen upon the quarry, and the furnishing the materials charged in the specification, I am at liberty to infer a request on the part of the corporation to the copartnership to do so, then I find such request, but from no other evidence in the case.

DAVENPORT & EDDY, for the plaintiffs.

Book account will lie: *Sargeant* v. *Pettibone*, 1 Aik. 355; *Wilkins* v. *Stevens*, 8 Vt. 214; *Warden* v. *Johnson*, 11 Vt. 455; *Chellis* v. *Woods*, Ib. 466; *Weller* v. *McCarty*, 16 Vt. 98; *Gassett* v. *Andover*, 21 Vt. 342. It was the duty of the auditor to do as he has done—adjust all the items of account due and payable at the time of the audit and strike the balance as he finds it: *Ambler* v. *Bradley*, 6 Vt. 119; *Pratt* v. *Gallup*, 7 Vt. 344; *Martin* v. *Fairbanks*, 7 Vt. 97; *Wetherell* v. *Evarts*, 17 Vt. 219; *Chaffee* v. *Malarkee*, 26 Vt. 242.

In the absence of fraud and bad faith, contracts thus entered into between a corporation and some one or more of its members, are binding to the same extent as if made with outside parties. Angell & Ames on Corp., § 233; *Turnpike Co.* v. *Willard*, 5 Mass. 85; *Gilmore* v. *Pope*, Ib. 491; *Canal Co.* v. *Gordon*, 1 Pick. 297; *Revere* v. *Copper Co.*, 15 Pick. 351; *Rogers* v. *Danby U. Society*, 19 Vt. 187.

PROUT & WALKER and W. H. SMITH, for the defendant.

All the dealings between these parties were copartnership business and grew out of their joint relation. And the defendants urge that the action of book account is not the appropriate remedy for the settlement of such claims: *Hydeville Co.* v. *Barnes*, 37 Vt. 588; *Huxley* v. *Carman*, 46 Vt. 462; 10 Vt. 314; 22 Vt. 181; 27 Vt. 286; 29 Vt. 1; 31 Vt. 395. The plaintiffs "assumed the lease and contract" and "undertook to carry out the same." Some one of the plaintiffs *signed the notes* with *defendant's name* and *indorsed* them with plaintiffs' name. Plaintiffs kept the books of both parties *all in one.*

As the case finds the defendant *never requested* the plaintiffs to indorse its paper or pay any of the debts which plaintiffs seek to charge upon defendant in this action. The defendant knew how the business was being done and made no objection, as the case finds. *Who was there to object? Personally* the defendants are all plaintiffs here. How could the defendant object, as plaintiffs controlled the corporation? The case furnishes no ground for *inference* of a request on the

part of the defendant, or for an "*acquiescence*" on its part. The plaintiffs were *all in all* on both sides. Defendant insists that all the doings of the plaintiffs in their whole business, including the indorsing the paper of defendant, and their payments, as claimed in their account, were purely voluntary and constituted no claims that can be enforced in this action. In no event can the Lynch claim be allowed.

The opinion of the court was delivered by Ross, J.

The defendant was the owner of an undeveloped marble quarry in Rutland. The plaintiffs were its principal stockholders, owning and controlling a majority of the capital stock. February 17, 1871, the defendant leased to parties who are represented in this suit by the plaintiffs, a portion of its property, whereon they agreed to erect a mill for sawing and manufacturing the marble of the defendant, and by a contract between the parties to the lease contemporaneously executed, and which formed a part of the same transaction, the defendant contracted to furnish the other party marble from its quarry sufficient to stock the mill for a term of ten years, and the other party agreed to manufacture the marble thus furnished, sell and collect the pay therefor, without expense to the defendant. The avails of the sales of the marble thus manufactured and marketed, it was agreed should be divided equally between the parties. The contract evidenced by the lease and contemporaneous written agreement was previously authorized by the defendant. The fairness and justness of this contract has not been attacked. Because the plaintiffs owned the controlling interest in the stock of the defendant, and were most of them officers as well as stockholders, and so stood in a *quasi* trust relation to the other stockholders of the defendant, if the fairness and good faith of the contract were attacked the court would carefully scrutinize its provisions, and, if found to operate to the prejudice of, and to have been made without the knowledge or acquiescence of the other stockholders, would ordinarily refuse to enforce its unjust provisions against the defendant even. But no such question arises on the facts found by the referee.

The first question made by the defendant is, that the plaintiffs and defendant were partners in the manufacture of the

marble, and if not partners, their contract relations were such that the plaintiffs can not maintain this action of book account to settle the matters in issue. By the contract the defendant was to quarry and furnish the marble on the cars, and pay one half of the expense of running it to the plaintiffs' mill. The plaintiffs were to be at one half the expense of running the marble to the mill on the cars, to manufacture and sell the marble thus furnished, and collect the pay for the same. What was thus collected was to be divided equally between them. From this statement it is apparent, that whether from a performance of the contract the plaintiffs realized a profit or sustained a loss, depended upon whether the expenses of manufacturing, selling and collecting the pay for the marble furnished by the defendant, were less or greater than one half the sum collected from the sales; and whether the defendant's performance of the contract resulted in a profit or loss to it, depended upon whether the cost of quarrying the marble, conveying it to and loading it upon the cars, together with one half the car fare to the plaintiffs' mill, was less or greater than one half the amount realized from the sales. The defendant might realize a profit while the plaintiffs sustained a loss from the performance of the contract, and conversely. There was no community of profit and loss growing out of the performance of the contract existing between the parties, and therefore no partnership. Neither were the parties jointly interested in, or liable for the performance of the same provisions of the contract, except the single provision that they were to share equally the amounts collected from the sale of the manufactured marble. It was not in any sense a joint contract, by which they became joint debtors or joint creditors to any third parties, nor in any such sense that would prevent the maintenance of an action of book account. The collections made by the plaintiffs from the sales of the manufactured marble were to be credited, one half to the defendant, and the other half they had a right to take and use as their own. Immediately upon the receipt of any money by the plaintiffs from such collections, the right accrued to the defendant to charge one half of the same to them upon book. If in the deal between the plaintiffs and the defendant, the plaintiffs paid out any money or did any work for the

defendants, the right thereupon accrued to them to charge the same to the defendant upon book. The auditor has reported that the charges for which he has allowed the plaintiffs were for moneys paid on notes of the defendant which they had indorsed, and on claims to laborers for services in quarrying the marble, the payment of which the plaintiffs had guaranteed. If the indorsements and guaranties were made at the request of the defendant, the payment of money thereon by the plaintiffs would be to the use and benefit of the defendant, and gave them the right to charge the same to the defendant upon book. The auditor has found that the indorsements and guaranties were made at the request of the defendant, if its knowledge of and acquiescence in their doing so was evidence from which such a request can legitimately be found. Considerable importance has justly been given to acquiescence in binding corporations, which are but legal entities acting through agents, and without personal existence. Knowing of the indorsements and guaranties by the plaintiffs, and then taking the benefits thereof, amount to a ratification thereof by the defendant, if such indorsements and guaranties were originally unauthorized. We entertain no doubt that the evidence had a legitimate tendency to establish the fact found therefrom by the auditor. But the right to charge for money paid on such indorsements and guaranties, did not arise at the time they were made by the plaintiffs; but at the time they paid the money thereon for the defendant. Until the payment of the money, the plaintiffs' obligation to pay was collateral to that of the defendant. If the defendant discharged its obligation by paying the claims indorsed or guaranteed, no right to charge or of action would ever accrue to the plaintiffs. In this action, unlike ordinary actions, all matters for which a charge upon book can properly be made before the time of the hearing before the auditor, are to be settled, though they accrued after the commencement of the suit. From the auditor's report we do not understand that he has included any items in his allowances which did not accrue before the time of the hearing, excepting the unpaid balance of the claim to Thomas Lynch. So much of that claim as the plaintiffs had not paid at the time of hearing they had no right to charge for, and no right to recover for in this action.

Nor do we understand that the auditor has included any claims which may have accrued to Flint Brothers, but only such as have accrued to these plaintiffs.

The result is, the judgment of the county court is reversed, and judgment is rendered for the plaintiffs for the amount reported, less the unpaid balance of the Thomas Lynch claim.

BYBEE v. HAWKETT ET AL.

(12 Federal R. 649. U. S. Circuit Court, District of Oregon, 1882.)

[1]**Agreement amounting to partnership.** A contract between three persons to operate a "mining property as a company" creates a partnership of such persons from the date thereof, and makes each of them liable for the debts contracted in the prosecution of the enterprise; and this, notwithstanding the fact that such contract also provides that there shall be no division of profits between the parties until two of them are reimbursed therefrom the money expended in the purchase of their share of the property, and the cost of improving the same.

Mortgage securing old debt. The mortgagee, in a mortgage to secure an antecedent debt, is not regarded as a purchaser, and therefore the lien of his mortgage will be postponed to that of a prior but unrecorded one.

Attempted set-off by junior mortgagee. In a suit to enforce the lien of a mortgage, a subsequent mortgagee, who is made defendant on that account, can not set up a claim or have a decree against the plaintiff for the amount of his debt upon the ground that the plaintiff is personally liable to him therefor as partner of his mortgagor.

A personal arrangement whereby one of the partners shares his interest with a stranger, does not make such stranger a member of the firm. No one can become a member without the knowledge and consent of all.

In Equity.

B. F. DOWELL and WALTER W. THAYER, for plaintiff.

E. C. BRONAUGH, for defendants, Robinson and Magruder.

DEADY, D. J.

This case was before the court (6 Sawy. 593) on a motion

[1] *Duryea* v. *Burt*, 11 M. R. 395; *Snyder* v. *Burnham*, 77 Mo. 52.

of the plaintiff to remand it to the State Circuit Court for the county of Jackson, where it was commenced on June 18, 1879, and the statement of the case there made is now referred to. Afterward, on May 2, 1881, exceptions for impertinence were allowed to certain portions of the "reformed bill," including those relating to the Irwin note for $1,328.33 (erroneously printed in 6 Sawy. as $3,128.33), the note to Kubli and Bolt for $85.43 signed by the plaintiff, and the $86.24 due from Irwin to the plaintiff.

The cause is now argued and submitted on the pleadings, including the answers of the defendants, Jesse Robinson, E. C. Robinson, John L. Robinson, and C. Magruder for himself and partner, Benjamin Haymond, and the testimony and exhibit; the defendants, A. W. Hawkett, William W. Irwin, William Smith, Kasper Kubli, John Bolt, James F. Gazley, A. A. Fink, and Thomas Robinson having failed to answer.

It appears that on October, 13, 1877, James Neely, as administrator of the estate of Evan Taylor, deceased, sold to the plaintiff, William Bybee, a certain mining property known as "The Taylor Claims," situate in Josephine county, Oregon, and described as lot 5, in section 35, of township 35 S., range 7 W., and two water rights and ditches approximate thereto, for the sum of $3,100, there being an agreement at the time between said Bybee and William Smith and William Irwin, that the latter should each be entitled to a conveyance of an undivided one third of the property upon the payment to Bybee of one third of the cost thereof, and that in the meantime they would work the mine together, which they did for about six months.

On March 1, 1878, Bybee bought out Smith for $500, and gave him his note for the amount, payable in two years.

On July 26, 1878, Neely, by order of the proper court and in pursuance of the sale aforesaid, conveyed the premises to Bybee, who on the same day sold and conveyed an undivided two thirds thereof to the defendants, A. W. Hawkett and E. C. Robinson; and on the same day and as a part of the transaction, said Bybee entered into a written agreement with said Hawkett and Robinson in the words and to the effect following:

"That, whereas, the party of the first part (Bybee) has

sold to the parties of the second part (Hawkett and Robinson) the undivided two thirds of certain mining property in Josephine county, Oregon, known as the Taylor claims, and said parties agree to mine and operate said mining property as a company, and as a consideration for said two thirds interest the said parties of the second part are to pay certain debts; it is therefore agreed as follows: That said parties of the second part agree to pay and assume $6,098.24 in the following debts, to wit: To James Neely, administrator of Evan Taylor's estate, $2,784.56; Kasper Kubli, $882.68; Daniel Green, $500; William Smith, $500; and agree to pay to William Bybee, $1,432. The said amounts to be paid down, or arranged upon such time as may be agreed on between the parties of the second part and the persons to whom said debts are due."

The agreement then further provided:

(1) That the "parties of the second part agree to put on said claims, at their own expense, such improvements and additional machinery as may be necessary;" (2) that all the "amounts above mentioned, and also the cost of any additional improvements which may be put onto said claims, are to be repaid to said parties of the second part out of the profits taken out of said mines when the same shall be taken out, and before any dividends shall be made to the members of said company;" (3) that the profits of said mines, after repaying the amount of said debts and the cost of said improvements, "shall be equally divided between the then members of said company, aforesaid;" and (4) that said property and "the improvements which shall be hereafter put on said claims are to be held as a lien and security for the payment of the debts above specified."

This agreement was executed at Jacksonville, Oregon, by Hawkett, for himself and E. C. Robinson, who was then at Oakland, California, living with his father, the defendant, Jesse Robinson. The defendant, C. Magruder, was also present, and paid out for E. C. Robinson, upon the purchase of the property, to Neely, $2,784.56, the balance due from Bybee to the administrator on the sale of the property to him in October, 1877; to Bybee, $432; to Kasper Kubli a check upon E. C. Robinson for $500, which was duly paid.

At the same time that Hawkett and Robinson purchased from Bybee, it was arranged to buy out Irwin's equity for $2,500, which was paid as follows: $500 by Hawkett in cash, furnished by E. C. Robinson; by receipt for $500 due Magruder from Irwin on account; and by the undertaking of Hawkett and Bybee to pay $85.43 due said Kubli from Irwin, and of Hawkett to pay $86.24 due from Irwin to Bybee. For the balance of the sum due Bybee, Hawkett, for himself and Robinson, gave a promissory note for $1,000, payable to the order of Bybee one day after date, with interest at 1 per cent. per month, and for the balance due Kubli they gave a similar note for $382.68, with Bybee as surety. Nothing has been paid on these notes by Hawkett or Robinson, nor upon the sums due Green and Smith, as aforesaid. The sums due Green and Smith have since been paid by Bybee, and on December 2, 1879, Kubli obtained a judgment for $489.15 on the note given him for $382.68, which Bybee satisfied on July 6, 1881.

Hawkett and E. C. Robinson commenced operations on the mine in September, 1878, digging a ditch of some length, and putting up a giant and pipe furnished by Jesse Robinson, from California. About the first of January they commenced to work the mine, and in that month Jesse Robinson visited the mine and remained there until the following spring, giving more or less direction to its management. The mine did not prove remunerative, and Hawkett, who had put his skill and services as a miner into the venture against Robinson's money, on March 17, 1879, withdrew from the company and conveyed his third of the property to E. C. Robinson for the nominal consideration of $5,000.

On May 13, 1879, E. C. Robinson mortgaged the undivided two thirds of the premises to the defendants, Magruder and Haymond, to secure the payment of his note of the same date, made payable to said defendants 30 days after date, for the sum of $2,295, with interest at the rate of 1 per cent. per month; which mortgage was duly recorded on May 15, 1879. On May 14, 1879, E. C. Robinson again mortgaged the same interest in the premises to the defendant, Jesse Robinson, to secure the payment of his note of the same date, made payable to said defendants 30 days after date, for the sum of $4,975,

with interest at the rate of 1 per cent. per month; which mortgage was duly recorded on the same day; and on July 16, 1879, said Jesse Robinson assigned said last-mentioned note and mortgage to his brother, the defendant, John L. Robinson, of Tioga county, Pennsylvania, for the sum of $4,300.

This suit has now diminished to a proceeding to enforce the agreement of July 26, 1878, including the lien provided therein as a security for the payment of the debts therein specified. There is also an allegation left in the bill that the Robinsons did not truly account for the gold dust taken out of the mine, and a prayer for an account. The answers of the defendants E. C. and Jesse Robinson state that only $2,800 was taken out up to the commencement of this suit, when the mine passed into the hands of a receiver, where it has since remained, all of which and much more was expended in improving and working the mine; and whatever the fact may be, the evidence to the contrary is vague, trifling, and scarcely worthy of consideration.

The agreement of July 26, 1878, is practically a personal obligation of Hawkett and E. C. Robinson, and also Jesse Robinson, if he was a partner with them in the purchase of the mine, as the plaintiff alleges, to pay the debts therein specified, and also a mortgage of the property to secure such payment. The personal liability of E. C. Robinson and Hawkett, in case the property is not sufficient to pay the debts, is admitted; but that of Jesse Robinson depends upon the fact whether or not he was a partner with Hawkett and E. C. Robinson in the purchase on July 26, 1878. He was not known in the transaction as such. Bybee did not give him credit or part with anything upon the faith of his being responsible for it as a partner or otherwise. But he now alleges that Jesse Robinson was a secret partner in the purchase, and the burden of proof is upon him to establish the fact before he can hold him responsible as such.

The evidence upon this point is conflicting, and largely made up of admissions by members of the company to the effect that J. Robinson was a partner, which are clearly inadmissible for that purpose (1 Greenl. Ev. § 177), and the casual and indefinite conversations and remarks of J. Robinson concerning the management and prospect of the business

while he was at the mine, which might have proceeded from the fact that he was interested as a partner, or as the father of E. C. Robinson, and the principal creditor of the company. Hawkett is the only witness that testifies that J. Robinson ever said he was a partner in the purchase of the mine, and his statement is to the effect that J. Robinson was the real party in interest, but that he did not want to be known in the matter. But his credibility is affected somewhat by the fact that he may be now trying to shift the responsibility of a losing adventure undertaken upon his judgment and recommendation, and is very much affected by the further fact that on May 11, 1879, he deliberately wrote to a person seeking to collect one of the debts specified in the agreement of July 26, 1878, that J. Robinson had no interest in the matter, except that he had loaned him and E. C. Robinson money to open the mine with.

Both E. C. Robinson and J. Robinson deny in their answers that the latter was a partner in the purchase or working of the mine, and the evidence of the plaintiff is not sufficient to establish the partnership against these denials, if at all. It may be and probably is true that there was some private agreement or understanding between the father and the son by which the former was interested with the latter in this adventure, and that so far they sustained to one another the relation of partners instead of debtor and creditor, but that would not make J. Robinson a partner of the firm of Hawkett and E. C. Robinson, or Hawkett, Robinson and Bybee. No one can become a member of a firm without the knowledge and consent of all the partners. Collyer Part. 5.

The agreement of July 26, 1878, was not recorded until May 30, 1879, and subsequent to the execution and record of the mortgages to Magruder and Haymond and Jesse Robinson, but before the assignment of the latter to John L. Robinson. But both these mortgages and this assignment were made in consideration of previous indebtedness, and therefore the mortgagees and assignees are not entitled to be regarded as purchasers. Besides, such mortgagees must be held upon the proof to have had actual knowledge of the lien provided for in the agreement of July 26th, and therefore took their mortgages in subordination thereto, irrespective of the question of

priority of record. The assignee had constructive notice of this lien also when he took his assignment, as the agreement had then been admitted to record. Jones Mort. § 458 and note.

These conclusions are admitted by counsel for the defendants, E. C. Robinson and J. Robinson, but he also claims that Bybee was a partner in the working of this mine from the date and by virtue of the agreement of July 26th, and that so much of the debt due Magruder and Hawkett as arose from the furnishing of supplies to the company, Bybee, as a member thereof, is personally liable for, and therefore his lien upon this property or the proceeds of it ought to be subject in this suit to the satisfaction of this claim. It is admitted that the debt for which the mortgage was given to J. Robinson is not a demand against the company, it being wholly for money and material furnished Hawkett and E. C. Robinson to enable them to open and improve the mine as per their agreement with Bybee. It is also admitted that $500 of the debt for which the mortgage was given to Magruder and Hawkett is not a demand against the company, it being the sum advanced by Magruder to Irwin for E. C. Robinson on the purchase of his interest in the mine, the advance being made by the settlement of an account of that amount which Irwin owed Magruder. The remaining $1,795 of this debt, it is claimed by Magruder in his answer, was due from "Hawkett and E. C. Robinson," *or* "the company mentioned in said agreement of July 26th," "for goods, provisions, etc., furnished to said company, and for freighting done by said firm of Magruder & Hawkett for said firm or company of the Josephine mine" prior to May 13, 1879.

This is indefinite as to whether the goods and freighting were furnished to Hawkett and Robinson while opening the mine, or to Bybee, Hawkett and Robinson while operating it. In the first case Bybee would not be liable under any circumstances. No testimony has been offered on the subject except the answer of Magruder, and that is not satisfactory. In the nature of things these supplies and this freighting would be furnished to improve the mine as well as to operate it. The burden of proof is, I think, upon Magruder and Hawkett to show that these things were furnished to a company of which

Bybee was a member. Besides, the fact that he settled with E. C. Robinson, who then represented Hawkett as well as himself, and took his individual note for the amount and a mortgage upon his individual interest in the mine as security, without paying any attention to Bybee or his interest, is a circumstance tending to show that Magruder did not then regard the debt as due from Bybee.

On the other hand, counsel for the plaintiff insist that Bybee was not, by the terms of the agreement of July 26th, to become a partner with Hawkett and Robinson until the proceeds of the mine had reimbursed them for the money expended in its purchase and improvement, which, it is admitted, it never did.

In my judgment the agreement created a partnership from its date, consisting of Hawkett, Robinson and Bybee, for the purpose of operating the mine, and that, whenever it was operated by any or either of them, they all became liable for the debts thereby incurred; and the fact that a division of profits between the partners was postponed until the money advanced by Hawkett and Robinson for the purchase of a two thirds interest, and the improvement of the whole of it, does not affect the unqualified agreement of the parties in words of the present tense—"to mine and operate said mining property as a company."

In *Beauregard* v. *Case*, 91 U. S. 134, a question of partnership arose under very similar circumstances. In the course of the opinion of the court, delivered by Mr. Justice Field, it is said:

"There was in this agreement all the essential conditions for the creation of a partnership—provision for a union of services and money, and a division of profits and losses. The postponement of a division of profits between the three partners until the capital advanced by two of them should be refunded, with interest, did not alter the character of the agreement as one of partnership, nor the liability of all the partners to third persons for debts contracted in the prosecution of its business."

But admitting the partnership, and assuming that this debt is a valid demand against the firm, and that therefore Bybee is liable therefor, I do not see how Magruder and Hawkett can set up their claim in this suit.

So far as Bybee is concerned this is a suit to enforce the agreement of July 26th as a personal contract against Hawkett and E. C. Robinson, and as a mortgage against the property. Magruder and Hawkett are not parties to it, nor have they any rights in it except by reason of the lien of their mortgage, and that to have their mortgage adjudged valid and assigned its proper place in the order of time and payment. But it is admitted that it is subsequent in point of time to that of the plaintiff, and that its payment out of the proceeds of this property as a debt secured by a lien thereon must be deferred until that is satisfied. But the defendants have no standing in this suit or right in this property except as mortgagees, and that is subordinate to the plaintiff's. This is not a suit to recover anything from the defendants, Magruder and Hawkett, and in which they can, therefore, plead a counter claim or set-off. Neither can they, if they would, convert their answer into a species of cross-bill and subject the sum which the plaintiff may obtain in this suit to enforce his mortgage against the property in question to the satisfaction of an independent personal claim which they may have against him. If they wish to enforce such a claim against him as a member of the partnership created by the agreement of July 26th, the courts are open to them to bring their action against him for that purpose.

The plaintiff paid the balance of the debt to Kubli of $382.68 as follows: He signed the note of Hawkett and Robinson therefor as surety, drawing interest at 1 per centum per month, upon which Kubli obtained judgment, which the plaintiff paid; and he now seeks to recover what he paid on that judgment, including the interest, costs and attorney fee, rather than the original amount, with legal interest.

But the liability of Hawkett and E. C. Robinson arises upon the agreement of July 26th, which is to pay the debt specified therein, with such interest as the law will allow thereon, none being agreed upon, and the costs properly chargeable against them in this suit for its collection. Whether the plaintiff has gained or lost in his contract as surety, or in the acquisition of these claims, is nothing to the defendants. As has been said, their liability in this suit is measured by the agreement of July 26th.

The plaintiff, on his own account and as the representative of the other creditors mentioned in said agreement, has the first lien upon this property for the sum of $2,382.68, the aggregate sum of said claims, with interest thereon at the legal rate, to wit, 10 per centum per annum, from July 26, 1878, to January 25, 1880, a period of one year and six months, and at 8 per centum from then to July 1, 1882, making in all the sum of $3,113.36, together with the costs and expenses of this suit, except as to the defendants against whom the bill is dismissed.

The defend nts, Magruder and Hawkett, have the second lien upon the undivided two thirds of the property for the full amount of their note and mortgage, with interest as therein provided, and the costs of their defense.

The defendant John L. Robinson, as the assignee of Jesse Robinson, has the third lien upon said undivided two thirds of said property for the full amount of his note and mortgage, with interest as therein provided, and the costs of his defense.

The decree of the court will be that the bill be dismissed as to the defendants who are not liable to the plaintiff in this suit, and have no interest in the subject of it, namely, Jesse Robinson, Thomas Robinson, William W. Irwin, William Smith, Kasper Kubli, John Bolt, James F. Gazley and A. A. Fink, and that they, and each of them, recover costs from the plaintiff; that the master of this court sell this property as upon an execution at law, and apply the proceeds, after paying the costs and expenses of the sale, upon the claims aforesaid in the order specified.

1. Contract of partnership, how affected by the fact that the partners are also tenants in common: *Graham* v. *Pierce*, 19 Grat. 28; *Post* TENANTS IN COMMON.

2. Partnership relation created by contract to work mine on shares: *Henderson* v. *Allen*, 6 M. R. 227.

3. Members of an unincorporated mining association are tenants in common: *Santa Clara Ass'n* v. *Quicksilver Co.*, 17 Fed. 657.

4. Co-tenants working a mine are partners: *Dougherty* v. *Creary*, 1 M. R. 35; *Manville* v. *Parks*, 7 Colo. 128.

5. The firm is held for fraudulent representations of a single partner: *Peckham Iron Co.* v. *Harper*, 41 Oh. St. 100.

6. Contract for manufacture and sale of brick construed to be a partnership rendering both parties liable for a breach of contract of sale: *Farmers Ins. Co.* v. *Ross*, 29 Ohio St. 429.

7. Shareholder held liable as a partner in respect of contracts entered into by joint stock company, notwithstanding misrepresentation in prospectus as to number of shares sold, such shareholder having an opportunity to learn the facts: *Steigenberger* v. *Carr*, 3 Scott's N. R. 466; 3 M. & G. 191.

8. A sold coal of his firm to another firm, of which he was a member, with notice to his partner, and at the full market value: *Held*, that he was not liable to account for profits received by him as partner in the purchasing firm: *Freck* v. *Blackiston*, 83 Pa. St. 474.

9. A contract by which a person, about to start for California, agreed with his former partners to share the profits of his mining business while there, upon certain terms, *held*, to be a contract of partnership: *Harris* v. *Hillegass*, 54 Cal. 463.

10. Distinction between corporate and partnership liability: *N. Y. Iron Mine* v. *First Nat. Bank*, 1 M. R. 453.

11. The receipt of a percentage upon the gross amount of sales made to customers by the person who recommended such customers, does not constitute him a partner as against third persons: *Pott* v. *Eyton*, 3 C. B. 32.

12. An unincorporated association can not sue under its copartnership name: *Mexican Mill* v. *Yellow Jacket Co.*, 11 M. R. 175.

13. The associates in a void corporation, treated as partners: *Hill* v. *Beach*, 12 N. J. Eq. 31.

14. Land brought into a partnership as stock, treated as personalty: *West Hickory Mining Ass'n* v. *Reed*, 80 Pa. St. 38.

15. The fact that tenants in common of ore land entered into a partnership for manufacturing iron, and that the proceeds from their ore land were entered in the firm books, did not make the land and the proceeds firm property: *Grubbs' App.*, 3 M. R. 416.

16. Partnership interest in land and quarry held to pass to heir at law and not to personal representative: *Steward* v. *Blakeway*, L. R. 6 Eq. 479.

17. In ejectment for an interest in a mining claim to which the plaintiff holds the legal title, the answer being a general denial, defendant can not defeat the action by showing the claim to be partnership property: *Lowe* v. *Alexander*, 15 Cal. 297.

18. After the sale of an interest in a lease of a colliery, by one partner to his copartners, and a dissolution of the partnership, a railroad company paid $10,000 damages for the location of its road on he leased property prior to the dissolution. *Held*, that each of the former partners was entitled to his proportionate share of the sum: *Blackiston's App.*, 8 ½ Pa. St. 339.

19. Distribution of partnership effects upon dissolution: *Faulds* v. *Yates*, 3 M. R. 551.

20. Bill for dissolution of mining partnership, involving questions of settlement of accounts, compensation of copartner, appointment of receiver, etc.: *Levi* v. *Karrick*, 13 Iowa, 344; 8 Id. 150.

21. For an action for the dissolution of a mining partnership and the conveyance to plaintiff of a specific interest in the partnership property, see *Welland* v. *Huber*, 13 M. R. —

22. Partnership in iron works terminated by assignment of interest and

notice to other partners: *Jefferys* v. *Smith*, 3 Russ. Ch. 158; 1 Jac. & W. 298.

23. Lease of interest in partnership mines by one to the other partner operates as a dissolution or suspension of the partnership. Partnership dissolved by war: *McAdams* v. *Hawes*, 9 Bush. (Ky.) 15.

24. The relationship of general agency among partners: *Lyell* v. *Sanbourn*, 1 M. R. 313; *Manville* v. *Parks*, 7 Colo. 128.

25. A partner who buys in an outstanding interest in partnership property for the purpose of curing a defective title, buys for the benefit of the concern: *Forrer* v. *Forrer*, 29 Grat. 134.

26. The partner of an agent is not under a fiduciary relation to the principal of that agent by reason of his partnership with such agent: *Hardenbergh* v. *Bacon*, 1 M. R. 352.

27. One partner can bind another only in regard to partnership transactions: *Jones* v. *O'Farrel*, 1 Nev. 354.

28. One partner can not sue the other in an action at law; the remedy is by bill in equity for a dissolution and an account: *Barnstead* v. *Empire Co.*, 5 Cal. 299; *Stone* v. *Fouse*, 3 Cal. 292.

29. One partner may maintain an action against his copartner for his moiety of the value of mining materials and utensils sold to the latter upon dissolution without final settlement of partnership accounts: *Jackson* v. *Stopherd*, 4 Tyrw. 330; 2 Cr. & Mees. 361.

30. Assumpsit will lie for a balance struck between partners: *Kneer* v. *Hoffman*, 65 Pa. St. 126.

31. Two persons who form a partnership for mining under a lease, all the capital and implements belonging exclusively to one, may maintain a joint action for trespass upon the mines: *Douty* v. *Bird*, 60 Pa. St. 48; *Post* TRESPASS.

32. For the rules governing a mining prospecting partnership, see *Boucher* v. *Mulverhill*, 12 M. R. —; *Lawrence* v. *Robinson*, 12 M. R. —.

33. Partnership with lunatic: *Rowlands* v. *Evans*, 9 M. R. 644.

34. Partnership interest in mines subject to partition: *Hughes* v. *Devlin*, 12 M. R —.

35. Ratification of act done for benefit of partnership: *Lyell* v. *Sanbourn*, 1 M. R. 313.

36. Ratification by one partner is a ratification by all: *Id.*

37. Partners in mining lease precluded by laches from obtaining relief against enforced dissolution: *Clegg* v. *Edmondson*, 8 M. R. 180.

38. A partner who attends almost exclusively to the partnership, though such business be very great, is not entitled to special compensation without special contract to that effect: *Forrer* v. *Forrer*, 29 Grat. 134.

39. Joint liability of partners for injuries arising from unsafe condition of shaft though known only to one: *Mellors* v. *Shaw*, 9 M. R. 678.

40. Authority of mining partners to hire laborers qualified by contract that such hiring should be ratified: *Nolan* v. *Lovelock*, 9 M. R. 360.

41. Purchaser of partnership property at sheriff's sale on execution against one of the partners, is not entitled to a delivery of the property but only to an accounting: *Barrett* v. *McKenzie*, 24 Minn. 20. Such sale passes the interest of the defendant partner only: *Ward's App.*, 5 M. R. 666.

42. Prayer for dissolution not necessary on bill for accounting between partners: *Bentley* v. *Bates*, 10 M. R. 525.

43. The interest of a deceased mining partner represented by his administratrix, considered with respect to a subsequently acquired lease, holding that the right of action was in her: *Clegg* v. *Fishwick*, 1 Mac. & Gor. 294.

44. In a suit against the executor of a former partner in an oil well, the surviving partner was not allowed to testify for the plaintiff as to the existence of such partnership: *Hogeboom* v. *Gibbs*, 88 Pa. St. 235.

45. Loan of money in consideration of a percentage on the business does not make the lender a partner: *Boston Co.* v. *Smith*, 13 R. I. 27; 43 Am. R. 3.

46. Party attending meetings and purchasing shares, held, though he had never signed the partnership deed: *Ellis* v. *Schmoeck*, 13 M. R. —.

47. His admissions may hold him without proof that he signed the deed: *Reynolds* v. *Kay*, 9 B. & C. 356. Or by proof of applying for shares without proof of accepting them: *Bog Lead M. Co.* v. *Montague*, 10 C. B. N. S. 481.

48. Participation in profits makes a partner; but not the receipt of commissions on sales to miners of defendant's colliery brought to the concern by the defendant: *Pott* v. *Eyton*, 3 C. B. 32.

49. A man need not give notice that he is not a member of a firm with which he has never been connected, though one of the members is a partner with him under a different firm name: *Jones* v. *O'Farrel*, 1 Nev. 354.

50. A person dealing with a firm must have notice of dissolution in order to avoid his transactions with one of the partners after dissolution: *Kenney* v. *Altvater*, 77 Pa. St. 34.

51. Desertion of partnership: *Von Schmidt* v. *Huntington*, 6 M. R. 284.

52. A partnership may be implied from acts as well as by express agreement: *Manville* v. *Parks*, 7 Colo. 128.

53. Each partner has power to use the credit of the firm in working the mine—but not to borrow money or give notes. *Id.*

54. Partnership may exist without ownership of the mine. *Id.*

55. There can be no judgment against a partner not served: *Davidson* v. *Knox*, 7 Pac. 413.

56. A contract by which parties agree to procure a purchaser for a mine, working together for a sale, *held*, to constitute a partnership: *Kayser* v. *Maugham*, 6 Pac. 803; 8 Colo. 232.

57. It is not competent for the adventurers in a cost book mine to stipulate by their rules that unpaid calls shall be recovered as a debt due from the defaulting shareholders to the purser: *Hybart* v. *Parker*, 4 C. B. N. S. 209.

58. Two persons jointly acting in a mining venture are partners whether they so agree or not: *Snyder* v. *Burnham*, 77 Mo. 52.

59. Proof that a defendant had allowed himself to be given out at the mine as a capitalist interested in the mine with representations by the mine captain that the mine was being worked by a person of substance whose name he was not at liberty to give, *held*, to bind him as a partner: *Martyn* v. *Gray*, 14 C. B. N. S. 824.

60. All parties held as partners from the commencement, although by agreement among them certain individuals were to furnish all the capital for the first six months: *Peel* v. *Thomas*, 15 Com. B. 714.

61. The lien of a partner does not entitle him to possession to the exclusion of his co-tenant, although the partnership has ceased: *Morganstern* v. *Thrift*, 6 Pac. 689.

62. A mining partner objecting to a receiver can not charge for his own services as manager: *Pierce* v. *Pierce*, 5 › Mich. 629.

420 MINING CO. v. BULLION MINING CO.

(3 Sawyer, 634. U. S. Circuit Court, District of Nevada, 1876.)

[1] **Method of determining who is entitled to patent.** In the bill it was prayed that the complainant be decreed to be entitled to the mining ground in controversy, and that the defendant holds the legal title by patent from the United States in trust for complainant. *Held*, in order to ascertain which party was entitled to a patent it is only necessary to determine which party at the time of its issue was the rightful owner of the mining claim in question, as against everybody but the United States, under the laws, rules, customs and decisions of the courts in force at the time in the locality embracing it.

The miner's right a pre-emption. The right given by the mining acts of congress, is a right to purchase in the nature of a pre-emption, and is in nowise like an inchoate, imperfect, Spanish grant.

Idem—Not a bounty. The right of purchase under the United States mining acts is not a bounty.

Res adjudicata—Judgment on issues in bar and in abatement. In 1872 the 420 Mining Company brought suit against the Bullion Mining Company to determine the right of the latter company to 420 feet of the Comstock lode. Under the statute of Nevada, allowing matters going only to defeat the present action, as well as defenses on the merits to be pleaded together, defenses of the two sorts were accordingly pleaded. The issues upon both were found for defendant, and the judgment was entered in a form appropriate as an adjudication upon the finding upon the merits: *Held*, that the title was *res adjudicata* and the parties were estopped from further litigating the merits.

Estoppel—The element of mutuality in a judgment. In a case in which the findings and judgment are conclusive on both parties if conclusive on one, the estoppel is mutual within the rule, without regard to the question what would have been the effect had the findings and judgment been different.

Judgment reversed to avoid estoppel. If a judgment is broader in its scope and more advantageous to the plaintiff than he is entitled upon the record to have it, it may be reversed, although there is no technical error, solely upon the ground that all the points covered by it would be *res adjudicata* and operate as an estoppel.

Finding vacated without reversing judgment. One of several findings may be set aside without reversing the judgment if the remaining findings are sufficient to support the judgment, and the finding so vacated would be thus taken out of the operation of the rule relating to *res adjudicata*.

Adverse claim—Statute of Limitations. The Statute of Limitations of Nevada, constitutes a part of the local laws, by which the right be-

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[1] *Bay State Co.* v. *Brown*, 21 Fed. 167; *McGinnis* v. *Egbert*, 8 Colo. 41; *Wolverton* v. *Nichols*, 2 Pac. 308; 5 Mont. —.

tween an applicant for patent and an adverse claimant are to be determined.

Parol partition. A parol partition of a mining claim, if followed by exclusive possession of the several parcels, is doubtless valid; the parties cease to be tenants in common, and forever after deal at arm's length. All relation of trust and confidence ceases.

Ouster of tenant in common—Statute of Limitations. The taking possession of the whole mining claim by one tenant in common under a conveyance hostile to the title under which the co-tenancy exists, and excluding the co-tenant, is an ouster, from the date of which ouster the Statute of Limitations begins to run in favor of the tenant so taking exclusive possession, and against his co-tenant.

No fiduciary relation after ouster. Where a tenant in common has ousted his co-tenant, there ceases to be any fiduciary relation between them.

Adverse possession generates new title. Adverse possession for the time limited by the Statute of Limitations, not only bars the remedy but extinguishes the right and vests a perfect title in the adverse holder.

Affirmative aid to limitation title. A title acquired under the Statute of Limitations may be quieted in the adverse holder upon a bill in equity, filed for that purpose, even against the holder of the paper title barred.

[1] **Application for patent—A proceeding in rem.** Proceedings to procure a United States patent should be regarded as a proceeding *in rem* conclusive upon all the world.

Idem—Res adjudicata. The doctrine of *res adjudicata* should be rigorously applied to the litigation brought to test the right to the issue of a patent.

Demurrer to bill in equity.

The facts as alleged in the bill are as follows: On June 23, 1859, John Cosser and Walter Cosser, under the firm name of Cosser & Co., J. Morris, J. Durgan, Thomas Winters, V. A. Houseworth, C. True, J. Powell and A. Ricard located and appropriated, in the manner prescribed by the mining rules on the Comstock lode, a mining claim of 1,600 feet in length on the lode; took possession of the same, and thereby, as tenants in common, became the owners of said claim, as against all the world, except the United States. In July, 1859, the said parties, while still in possession, by a verbal agreement, to which all assented, agreed that said mining claim should be segregated into two parts, and that said Durgan, Morris, Powell, Ricard and True should

[1] *Wolfley* v. *Lebanon Co.*, 13 M. R. ——; *Wight* v. *Dubois*, 21 Fed. 693; *St. Louis Smelting Co.* v. *Green*, 4 McCr. 233; *Raunheim* v. *Dahl*, 9 Pac. 872.

thenceforth, as tenants in common, own and possess exclusively the portion of said claim and lode extending from its northern boundary southerly a distance of 420 feet, and should release all their interest in the other portion of said claim and lode to said Winters, Cosser & Co. and Houseworth, who should own and possess, in the same manner, said southern portion of said claim and lode, and release to said first-named parties all their interest in said northern portion of 420 feet. In pursuance of said agreement a monument was placed to mark the division line and the parties took possession of their respective portions, Durgan and his associates taking possession of the northern part, and Winters and his associates of the southern part, and thenceforth each of said parties and their successors in interest exclusively held possession and improved the part so allotted to them, in accordance with the mining rules and regulations, and claimed no interest in the other portions of said claim or lode. No written conveyance was ever made in pursuance of said agreement, and no demand for one was ever made, except the demand for the purposes of this action. All the right, title and interest of said Durgan and his associates in said north 420 feet of said lode were subsequently, by sundry mesne conveyances, conveyed to the complainant, a corporation organized under the laws of Nevada. Between the segregation, as aforesaid, and January 1, 1864, said Durgan and associates had spent in prospecting and developing said mine not less than $30,000, and since the latter date the 420 Mining Company have for like purposes spent an additional sum of $30,000. The Bullion Mining Company, a corporation organized under the laws of California, has since acquired all the right, title and interest of said Winters and his associates in the southern portion of said lode, and has since held the same in accordance with the mining rules and regulations. On November 16, 1868, the Bullion Mining Company commenced an action in the proper court against the 420 Mining Company, to recover said northern 420 feet of said lode, alleging title in plaintiff, and wrongful possession and withholding by defendant. Defendant answered, admitting possession by defendant, but denying that the possession was wrongful. This action was voluntarily dismissed on plaintiff's motion without trial, on June 3, 1872, without notice to the defendant to the

action. On November 6, 1868, while the 420 Mining Company is alleged to have been in possession of said northern 420 feet of said lode, the Bullion Mining Company applied at the proper land office for a patent, embracing the whole of said claim, both the southern part and said northern 420 feet conveyed to the 420 Mining Company, being the part now in controversy, under the acts of Congress, entitled, "An Act to grant the right of way to ditch and canal-owners and for other purposes," approved July 26, 1866, and in pursuance of such application a patent embracing the whole of said claim on the Comstock lode was issued in due form to said Bullion Mining Company on March 26, 1875. It is alleged in the bill that the said application for a patent was based solely on the said location, made June 23, 1859, and that the only pretense of title to said part in controversy is a conveyance to the Bullion Mining Company of their interest therein by said Durgan and his associates, made subsequently to the said conveyance by the same parties to the 420 Mining Company, with a knowledge at the time on the part of the Bullion Mining Company, of the prior conveyance to the 420 Mining Company.

On November 30, 1872, the 420 Mining Company commenced an action in the proper court in the State of Nevada against the Bullion Mining Company, to determine the adverse right of the latter company to said 420 feet of said lode, which action was duly tried and a judgment therein duly entered, and a copy of the record in that suit is annexed to, and made a part of, the bill of complaint in the present action.

It is further alleged that by reason of the issue of the patent, as aforesaid, the legal title to said northern 420 feet of said lode became wrongfully vested in the defendant; but that, by reason of the facts alleged, the complainant was really the owner of said 420 feet of mining ground, and entitled under said act of Congress to the patent therefor. The bill thereupon prays that the complainant be decreed to be entitled to said mining ground; that the defendant holds the legal title in trust for complainant, and that it may be required to convey said 420 feet of said lode to complainant.

The complaint in the record of the said action of the 420 Mining Company against the Bullion Mining Company com-

menced November 29, 1872, to determine the adverse claim of the latter, attached to and made a part of the bill, alleges that the 420 Mining Company, complainant therein, is "the owner of, in possession of, and entitled to the possession of," the said 420 feet of the Comstock lode now in controversy; that the Bullion Mining Company, defendant therein, "claims an estate or interest therein adverse to the plaintiff," and denies the validity of such adverse claim. It then sets out the commencement of the said former action by defendant against complainant to recover possession of said 420 feet; the answer of defendant denying the right; the application of defendant in this action for a patent; the filing of protest by complainant; the subsequent dismissal of the action to recover possession by complainant in that action (defendant in this) without notice to the defendant therein that the right has never been determined between the parties; and praying that the Bullion Mining Company, defendant, may be required to set forth its claim; that the rights of the parties be determined by the court, and that the defendant, the Bullion Mining Company, be adjudged not to have any estate or interest in said mining ground, etc. The answer to said complaint denies the ownership of the complainant, its right of possession and its actual possession of said 420 feet, or any part thereof, at the time of the commencement of the action. It denies that the defendant's claim is without right, and then affirmatively avers that "at the date of the commencement of this action, and for a long time prior thereto, it was and still is the owner of, and in possession of, and entitled to the possession of, said mining ground, ledge, or lode, and every part thereof." It then alleges affirmatively, in appropriate terms, an adverse possession in the defendant of the said 420 feet of the Comstock lode for a period exceeding the time required to give a title under the Statute of Limitations of Nevada in cases of mining claims; and that during all of said time the defendant had held and worked such claim in the manner required by the laws and customs in force in the district in respect to such claim; and then also avers affirmatively that neither the claimant nor any person under whom it holds had been seized or possessed of said 420 feet, or any part therein, within the period prescribed by the Statute of Limitations applicable to such cases; and fur-

ther, that the alleged cause of action had not accrued within a period of four years. Upon the trial of the issues, the co rt found the facts to be as follows:

"1. That the plaintiff was incorporated in the State of California, on the twenty-third day of June, A. D. 1863.

"2. That the trust deeds were executed to the 420 Mining Company, located in the Virginia mining district, county of Storey, Territory of Nevada, the first bearing date September 30, 1863, and the second July, 5, 1864, and each conveys all the right, title and interest of the parties therein named, as grantors of, in and to that certain mining ground known as the mining ground of the 420 Mining Company. No other description of the ground is given, and no title in either of the grantors to the mining ground in dispute in this action was shown.

"3. That some time in the fall of 1859, a shaft was commenced on the northern end of the ground in dispute in this action, by some persons claiming to represent a company called the 420 Company, and thereafter, down to the early part of the year 1863, work was done in three different shafts on the ground in dispute, by persons claiming to work for a company called the 420 Company. That no further work for any company of that name is shown to have been done until some time in the year 1865, when some persons commenced work in a shaft on said ground, claiming to work for the 420 Company, and continued there for a short time, until ejected by the employes of the defendant, as hereafter stated.

"4. That on the sixteenth day of November, 1865, the defendant in this action filed a complaint in this court against the plaintiff, alleging that it was the owner of the ground in dispute in this action, and that the defendant had entered upon and taken possession of and ousted the plaintiff from said mining ground now in dispute, and was still in possession thereof, holding adversely to the plaintiff, the Bullion Mining Company. Said complaint was sworn to by George W. Hopkins, secretary of said Bullion Mining Company. To that complaint the defendant, the 420 Mining Company, this plaintiff, filed an answer denying specifically each allegation of the complaint, and the same was sworn to by C. J. Lansing, its attorney in the case. Said action was pending untried until the——

day of———, 1872, when it was dismissed, on motion of the plaintiff therein.

"5. There was no evidence showing that any location of the mining ground in dispute in this action had ever been made by the plaintiff, or any person or persons through whom it claims.

"6. The defendant proved that it claimed under two locations of the ground and claim in dispute in this action. The two claims were united early in 1863, under the name of the Bullion Company, and on the eighteenth day of February, A. D. 1863, a trust deed, in which some of the original locators in each of said locations joined, was executed by various persons which conveyed, in terms, to this defendant, mining ground which embraces all the grounds in dispute in this action.

"7. In August, 1860, persons commenced work on the mining ground described in finding six, under the locations therein mentioned, and continued work until the conveyance made to the defendant, as aforesaid, and defendant has continued to work thereon day and night, from that time to within a few months past, all the time claiming title to all of said mining grounds, including said ground in dispute.

"8. On the seventh day of June, 1866, defendant received from one G. W. Birdsall, a deed of a mining claim, embracing the mining ground in dispute in this action. No title thereto was shown in said Birdsall, but defendant claimed title under that deed and the trust deed aforesaid.

"9. That the agents of defendant, in the year 1865, forcibly ejected from the mining ground in dispute in this action the persons mentioned in finding three, as working thereon for the 420 Company, and from that time until the commencement of this action, and until the trial, the defendant has been in the actual, exclusive and uninterrupted occupation and possession of all the mining ground in dispute in the action aforesaid, claiming title thereto, and claiming the same adversely to plaintiff."

"As a conclusion of law I find that the defendant is entitled to judgment as prayed in the answer, and order accordingly."

Thereupon the following judgment or decree was entered:

"This cause came on regularly for trial on the fifteenth day of August, A. D 1873, and by oral consent, given in open court, a jury was waived, and the trial had by the court, and the court having heard the evidence, and the cause being subsequently submitted, the judge this day filed his findings of fact herein in favor of the defendant. Thereupon it was ordered by the court that judgment be accordingly entered for the defendant. Wherefore, it is ordered and adjudged that the plaintiff is not entitled to any of the relief prayed for in its complaint, and that it take nothing by its action. It is further adjudged that the defendant have and recover of the plaintiff its costs of suit, taxed at $155.05."

"Judgment filed August 21, 1873."

The following are the provisions of the acts of Congress construed by the court:

Section one of the act of July 20, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," declares "mineral lands on the public domain to be free and open to exploration and occupation by all citizens of the United States," * * * "subject to such regulation as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States." Section two provides that "whenever any person, or association of persons, claims a vein or lode of quartz, or other rock in place bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same are situated, and having expended in actual labor and improvements thereon an amount of not less than $1,000, and in regard to whose possession there is no controversy or opposing claim, it shall, and may be lawful for such claimant, or association of claimants, to file in the local land office a diagram of the same so extended laterally or otherwise, as to conform to the local laws, customs and usages of miners, and to enter such tract, and receive a patent therefor, granting such mine," etc.

Section three provides "that upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a no-

tice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of such period, if no adverse claim shall have been filed, it shall be the duty of the surveyor general upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey and description, and a patent shall issue for the same therefor."

Section six provides as follows: "That whenever any adverse claimant to any mine located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication, in the courts of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases."

Section nine makes similar provision for confirming water rights under like circumstances; that is to say, "whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing and other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected therein." On July 9, 1870, six sections were added to the act and were thenceforth to form a part of it. Similar rights under section twelve (section 1 of the new act) were extended to the possessors of placer claims; and section thirteen provided that "where said person or association, they and their grantors, shall have held and worked their said claims for a period equal to the time prescribed by the Statute of Limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession

and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim."

In 1872 a new act was passed as a substitute for much of the former acts, making still more specific provisions as to the mode of proceedings, etc., but providing that the repeal of portions of former acts should not affect rights already vested thereunder, and that proceedings to perfect such vested rights might be had in pursuance of the provisions of the new act.

C. J. HILLYER, DELOS LAKE and R. S. MESICK, for complainant.

M. N. STONE, JOHN GARBER and R. H. LLOYD, for defendants.

SAWYER, Circuit Judge, after stating the facts:

Upon the facts shown by the bill of complaint, the defendant insists that the right to the four hundred and twenty feet of the Comstock lode in question, and, consequently, the right to the patent, appears in the bill to have been once directly put in issue, in an action between the same parties fully litigated and determined in favor of the defendant; and that the matter is *res adjudicata*, and a bar to further litigation. On this ground it is claimed that the bill shows no equity. After a careful consideration of the acts of Congress set out in the statement of the case, it is clear to my mind that it was the intention of Congress to give the right of purchase of a mining claim to a silver or gold bearing lode or vein, to the person or association of persons who, in pursuance of the laws of the State or Territory and the local mining customs, rules and regulations of the place where located, recognized by the laws and enforced by the courts, is the owner and entitled to the possession as against everybody except the government of the United States. It will be seen that the act expressly refers to, and recognizes, the laws of the State or Territory, the local customs, rules and regulations not in conflict with the laws of the United States, the decisions of the courts, and even, in express terms, the State and Territorial Statutes of Limitation applicable to the subject. The act requires the party seeking

a patent to file a diagram of the claim, and post a copy in a conspicuous place on the claim, together with a notice of intention to apply for a patent, and requires the register of the land office, also, to publish a notice of the same in a newspaper published at the nearest place, for ninety days. It then authorizes the adverse claimant, before approval of the survey, to file a protest, upon which all proceedings are stayed "until final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases." That adjudication is to be had in the ordinary courts, and to be determined under the ordinary rules, regulations, customs and laws of the locality. It seems impossible to come to any other conclusion, than that the party, who at the time can maintain his right to the claim in the courts of the country as against any person but the United States, under the local laws, customs, rules and regulations, is the party upon whom Congress intended to confer the right to purchase, no matter how that right originated, if under such laws and customs and decisions of the courts he has the present right. And this is simply a right to purchase—a privilege given to the party, of which he may avail himself or not, exactly like a pre-emption law, and founded upon similar reasons and policy. And what this privilege is, is stated in the case of *Hutton* v. *Frisbie*, 37 Cal. 479, and *Frisbie* v. *Whitney*, 9 Wall. 191. The case is in no wise like the case of an inchoate, imperfect Spanish grant, but is in all respects like a case under the pre-emption laws. The object of a determination of the right by litigation where there is an adverse claim, is simply to ascertain the party who has the right to the claim under the laws of the State and local rules and customs; for that person, when found, is the party upon whom the law confers the privilege—the right to purchase. There is no bounty about it, for the party must pay for the land five dollars per acre and the cost of survey, which is more than double the price of ordinary public lands. Undoubtedly the price is often far less than the real value, and so it often is in ordinary pre-emption cases; but this fact in no way affects the principle upon which the law proceeds. Doubtless the object of conferring the privilege is to encourage exploration of hidden mines, as the privilege in ordinary

cases of pre-emption is to encourage settlement and cultivation of the public lands, for the purpose of developing the resources and contributing to the general prosperity of the country.

If I am right in this view—a d it really does not seem open to serious argument—then, in order to ascertain which party was entitled to a patent, it is only necessary to determine which party at the time of its issue was the rightful owner of the mining claim in question, as against everybody but the United States, under the laws, rules, customs and the decisions of the courts in force at the time in the locality embracing it without regard to the act of Congress; for the act of Congress remits the parties to these laws, rules and customs solely to determine their rights.

The next question is, whether it appears, upon the averments of the bill, that the title to the mining claim in dispute, under the local laws and customs upon which it depends, has been once directly put in issue between the parties, and tried and determined in such manner as to become *res adjudicata.* If so, it ends the case. If not, it will be necessary to consider the other questions raised by the demurrer. After a thorough consideration of the question, I am unable to resist the conclusion that the title has been so put in issue, tried and determined as to become *res adjudicata* and a bar to further litigation. That it was put in issue, and the facts found, there can be no doubt; and I do not understand that this proposition is controverted. But it is insisted that there was another issue, also found for defendants, upon which the judgment might have been rested, and still be correct; and that there was no occasion to pass upon the title, and no authority in the court to pass upon it; or if there was authority so to do, that it does not appear affirmatively that the judgment went upon that ground, and consequently there is no estoppel. The statute of Nevada, at the time of the commencement of the action, the record of which is made part of the bill, authorized a party in possession of land or of a mining claim to bring an action against any adverse claimant to determine his adverse claim. As that is the most favorable view for complainant, I shall assume, what the defendant denies, that the action in question was brought under, and depended upon, that provision of the statute, and that in case of a failure to prove pos-

session at the time of the commencement of the action, the suit would necessarily fail on that ground, if on no other. The want of possession is not, strictly speaking, jurisdictional, for the court has jurisdiction to consider and determine the subject-matter. It is a technical dilatory objection in the nature of matter in abatement. It simply defeats the present action, without regard to the merits. The party out of possession, upon this view, must first bring his action to get into possession; but this would not be a complete remedy against a party claiming title adversely. A recovery of possession might be had and the defendant still set up his claim, and make it necessary for the successful party to bring another suit to determine his adverse claim, and enjoin his silence, even though the first judgment might be conclusive evidence of his right on the trial of the second action. Having recovered possession, he would then be in a position to maintain his further action to obtain a complete remedy. If he brings his action to determine an adverse claim while out of possession the most that can be said is, that his action is prematurely brought, and on this appearing it would be dismissed, as it would be one valid ground of defense to this particular action. The statute has since been amended, both in Nevada and California—and in Nevada the act passed pending this action—so that a party out of possession can now, at least, maintain the action. But conceding a want of possession at the commencement of the action to be one good defense, there may be several other good defenses, and section 1112 of the Compiled Laws of Nevada provides, that "The defendant may set forth by his answer as many defenses and counter-claims as he has. They shall each be separately stated," etc. Thus all defenses, whether dilatory or to the merits, may be set up in the same answer and tried together. If it is admissible to set up several defenses in one answer, it must be competent for the court to try and determine them all. The law neither enjoins nor permits a vain thing to be done. But it would be doing a vain thing to set up a defense which could not be tried when set up.

It may not be necessary to dispose of all the issues, and sometimes, doubtless, all are not determined; but it is certainly admissible to do so, and if properly tried and deter-

mined, I can see no good reason for not holding every issue so properly in fact tried and determined, to be finally and conclusively determined. Suppose the judge should be entirely satisfied that defendant's title is good, and so find distinctly, on that issue, without passing at all upon the issue as to whether defendant was in possession at the commencement of the action, either because the evidence on that point left it in doubt, or because, for any reason, he preferred to rest his judgment on the defendant's title—on the real merits of the case—can there be any doubt that the matter would be *res adjudicata?* If he is authorized to find the issue, without passing upon the other issue, and his determination would be *res adjudicata*, he is certainly authorized to pass upon it in connection with the other issue, and if so determined, it must have the same force as a determination in the other mode. The question must be, "Was the issue in fact determined?" In the case before tried, the complaint of plaintiff alleged title in itself, possession at the commenc ment of the action, and an adverse claim on the part of the defendant, together with other matters. The defendant took issue directly on the allegation of title, and on the allegation of possession in plaintiff at the commencement of the action, but admitted making an adverse claim. Another answer, then, affirmatively alleged title in defendant itself, and as affirmative matter, also, directly alleged, in apt and proper form, an adverse possession during the period prescribed by the Statute of Limitations of Nevada, applicable to the subject. Thus the title of the plaintiff, his possession at the commencement of the suit, and the adverse possession of the defendant for the period prescribed by the Statute of Limitations to bar the action and vest the title in defendants, were each directly in issue, and each issue was in fact submitted by the parties and tried by the court without a jury. A special finding was filed, from which it appears exactly what was found, and manifestly, all these three issues were found against the plaintiff. The court did not, in so many words, say in its finding that the plaintiff had no title, or in so many words, that the plaintiff was not in possession at the time of the commencement of the action, but it found facts which necessarily showed that plaintiff had no title, and that defendant had title; and it

found in express terms, in so many words: "That the agents of defendants, in the year 1865, forcibly ejected from the mining ground in dispute in this action, the persons mentioned in finding three, as working thereon for the 420 Company, and from that time until the commencement of this action, and until the trial, the defendant has been in the actual, exclusive and uninterrupted occupation and possession of all the mining ground in dispute in the action aforesaid, claiming title thereto, and claiming the same adversely to the plaintiff."

From the finding of the fact of adverse possession of defendant since 1865 it inferentially or argumentatively appears that the plaintiff could not have been in possession at the time of the commencement of the action. The court adds, as a conclusion of law, that the defendant is entitled to judgment, as prayed in the answer, and orders judgment accordingly. Upon these findings a judgment for the defendant, in the usual and proper form of a judgment on the merits, was entered, wherein, after reciting the filing by the judge of "his findings of the facts herein in favor of the defendant," "it is ordered and adjudged that the plaintiff is not entitled to any of the relief prayed for in the complaint, and that it take nothing by its action," and adjudged costs. This is certainly an appropriate judgment upon the finding on the issue as to adverse possession, and more appropriate to this issue than upon a finding merely against possession in the plaintiff at the time of the commencement of the action. It is not a judgment of nonsuit, or a judgment in form upon a plea in abatement, or a judgment in any manner without prejudice, but apparently and in form a judgment on the merits. As a matter of construction of the findings, and judgment, I also think it manifest that the judgment was intended by the judge to be based, and that it is based, upon the finding of adverse possession in the defendant for a period prescribed by the Statute of Limitations for barring the action and vesting title in the defendant, and on title in the defendant. The judge finds in express terms on that issue, and makes it the prominent finding in the case; while he does not find expressly on the issue as to the possession of plaintiffs at the commencement of the suit, but omits to say anything about that distinct issue presented on the allegation of the complaint.

It is only inferentially and argumentatively that we ascertain the fact of want of possession of the plaintiff at the commencement of the suit, from the finding of adverse possession in the defendants for a period covering the date of the commencement of the suit, on the affirmative issue tendered by the defendant in setting up the Statute of Limitation. It is evident from this, and from the fact that the judgment is appropriate to the finding, that the judge proceeded especially upon this finding in adjudging the matter in controversy—that he intended to put his judgment upon the merits of the case and not upon the matter of abatement—or matter not touching the merits, which only defeated the present action. Suppose this ninth finding had been omitted, there would be no finding at all upon the issue as to whether the plaintiff was in possession at the commencement of the action. Or, suppose, on appeal from an order denying a motion for a new trial, the Supreme Court had reversed the order as to the ninth issue only, finding adverse possession for the period specified, on the ground that it was not supported by the evidence, there would be no other finding showing that the plaintiff was not in possession at the time of the commencement of the action, upon which the judgment could be sustained. The Supreme Court of Nevada, under the practice that prevails in that State, only exercises appellate jurisdiction. It could not set aside a verdict on the issue as to adverse possession, and itself investigate the question anew, and make for itself another finding that plaintiffs were not in possession at a particular date—the date of the commencement of the suit —and on its own finding sustain the judgment. *Non constat*, that the court below would find on the evidence that there was no possession at that date, if the evidence was insufficient to show an adverse possession for the whole period found. The Supreme Court would, upon vacating the ninth finding, necessarily remand the case for a new trial on these issues. Had there been a tenth finding, that the plaintiff was not in possession at the time of the commencement of the action, the judgment might be sustained on that finding, upon the hypothesis I have assumed for the purpose of the argument, even upon a reversal of the ninth finding. Thus it appears that the judgment of the court must rest upon the ninth

finding, which was evidently intended to be, and is, a finding on the issue of adverse possession, and only inferentially and argumentatively shows that it includes the time at which the suit commenced, but is not an express finding on that issue. The two issues are not the same, not identical, for one is broader and includes more than the other. The court found the larger issue, which, of course, includes the smaller, and the judgment is rested on the issue as found, and not upon issues not mentioned at all in the finding, and which are only worked out by inference. As a matter of construction, then, I hold that the record shows upon its face that the question of adverse possession, and, consequently, of title in the defendants, was put directly in issue, litigated and found for the defendants, and that the judgment entered is rested on that finding. But if there had been another distinct, express finding, that the plaintiff was not in possession at the time of the commencement of the action, the other findings and the judgment being precisely as they now are, I still hold that the matter would be *res adjudicata*. As before stated, the statute of Nevada authorized the defendant to plead as many defenses as he had. He did plead several, each of which, if sustained, is good. All were tried and submitted, and the issues on the merits were expressly found in a special verdict showing that they were determined, and the judgment is appropriate to the issues on the merits, and sanctions and concludes the findings, which after judgment are no more open to question except on appeal. So are the authorities under the same system of practice as that which prevails in Nevada, and I have found none to the contrary. *Sheldon* v. *Edwards*, 35 N. Y. 286, is exactly in point on this proposition and on the last, but by no means so strong a case on the last proposition as is the case now under consideration. *Clink* v. *Thurston*, 47 Cal. 30, and *Munson* v. *Munson*, 30 Conn. 426, 433–4, are also in point, although the latter is under a system of practice different from that which prevails in Nevada. See, also, on the more general question, *Low* v. *Massey*, 41 Vt. 394; *White* v. *Simons*, 33 Vt. 178; *Farmer's Bank* v. *Bronson*, 14 Mich. 371; *Bissell* v. *Kellogg*, 60 Barb. 627; *Amory* v. *Amory*, 26 Wis. 151; *Felter* v. *Mulliner*, 2 John. 181; *Rockwell* v. *Langley*, 19 Penn. 502; *Doy* v. *Valletto*, 25 Ind. 42.

But the law as stated in a recent decision of the Supreme Court of the United States is also in point, and if it be correct must be conclusive. In *House* v. *Mullen*, 22 Wall. 42, there was a demurrer to the bill on four distinct specified grounds, of which the first was misjoinder of the parties; and the fourth, that the claim is stale and barred by the Statute of Limitations, etc. The decree is, "that it is considered by the court that the said demurrer of the defendants be sustained. It is therefore adjudged and decreed that the said bill of complaint of Eliza House, Mary Hunter and Charles Hunter be, and the same is, hereby dismissed out of this court." On appeal, the Supreme Court hold that the second, third and fourth grounds of the demurrer are untenable, and in those particulars the bill is good; but that the bill is bad on the first ground for misjoinder of parties, and that the "demurrer therefore was properly sustained and the bill dismissed." (Id. 46.) But, says the court, the record does not show that the bill was dismissed for misjoinder of parties, and it is not dismissed "without prejudice." "There are grounds stated in the demurrer which would, if sustained, be a bar to any other suit, to wit: staleness of the claim, Statute of Limitations, and long acquiescence in the possession and claim of title by the defendants. It does not appear by the decree, or by the order sustaining the demurrer, on which of the grounds set out in the latter it was dismissed, or on what ground it was dismissed. As the record stands, this decree might be pleaded successfully as a bar to any other suit brought by Eliza House, or by Mary Hunter, her child, in assertion of her right to this lot, though we are of opinion that the only defect in the bill is that it shows no interest in Mary Hunter, while it does show a good cause for equitable relief on the part of Eliza House. If the decree had dismissed the bill without prejudice, or had stated as the ground of dismissal the misjoinder of the parties, or the want of interest in two of them, we would have affirmed it; but to prevent a great injustice we must reverse the present decree and remand the case," etc. Thus on the ground alone that the decree in the form rendered would be a bar to another action, on points that ought not to be concluded it was reversed, although there was no technical error. Upon the doctrine of

that case there is no escaping the conclusion that the former judgment between the parties in this action is conclusive; for it is a much stronger case for the application of the doctrine than the one cited. In the former action between these parties, the issues were made, submitted, tried, and found by the judge in favor of the defendant in such manner as to show the exact issues found, and a judgment upon the findings entered; such as should be entered on the merits, a judgment in form upon the merits, and not in terms a mere "dismissal out of this court," as in the case of *House* v. *Mullen*. This, therefore, must be regarded as a judgment rendered on the merits. ' (See, also, *Durant* v. *Essex Co.*, 7 Wall. 109.) There was, in fact, an appeal in the former action, and counsel on both sides have referred to the opinion of the Supreme Court of Nevada on the appeal. (9 Nev. 248.) It is manifest that the Supreme Court also regarded the judgment as having been rendered on the merits, and affirmed it on the ground that the action was barred by the Statute of Limitations. In the case of *Aurora City* v. *West*, the Supreme Court also says: "The better opinion is that the estoppel, when the judgment is on the merits, whether on demurrer, agreed statement or verdict, extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause and was determined in the course of the proceeding." (7 Wall. 103.) And Mr. Justice Miller, who alone dissented, stated the rule to be that "when a former judgment is relied on, it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided." (Id. 106.) The case under consideration is, in my judgment, clearly within the very restricted doctrine as stated by Mr. Justice Miller; for it appears by the record itself what issues were submitted, and what issues of fact were in fact found, at least so far as the defense and title founded upon the Statute of Limitations are concerned.

The discussions in the courts have heretofore mostly arisen upon general verdicts where it could not be known from the verdict and pleadings upon what particular issues the jury passed. In such cases, some authorities hold that the party

relying on the estoppel must show by extrinsic evidence what issues of fact were determined, and this is the view which Mr. Justice Miller seems to hold in the dissenting opinion cited. Other, and apparently a majority of cases hold that a general verdict is itself *prima facie* evidence that all the issues of fact were determined, and that the party seeking to avoid the estoppel must show by extrinsic evidence what points in issue were not in fact determined by the jury; and the Supreme Court seems to go to this extent at least. But no such question can arise on special findings like those in this case where the record itself shows the exact issues found by the judge. The authorities cited by complainant's counsel relate to general verdicts, and are therefore inapplicable.

It is urged that upon the findings there is no estoppel, because the estoppel is not mutual, for the reason that, if certain findings had been the other way, it would not have been conclusive on both. It is not necessary to inquire what might have been the effect, had the findings and judgment been different. The question is, what is the effect upon both parties of the findings and judgment under consideration, not what the effect of some other findings and judgment might be. Are these findings and judgment conclusive on both parties, if conclusive on one? If so, the estoppel is mutual within the meaning of the rule. This point is also judicially determined in *Sheldon* v. *Edwards*, 35 N. Y. 288, before cited. There can be no doubt, I think, that in t is case both parties are concluded if either is, and the estoppel is therefore mutual within the rule.

It is further argued, that if this adjudication is conclusive it might result in injustice to the complainant; for if, on appeal, the Supreme Court should come to the conclusion that the finding upon the issue of the Statute of Limitation was not supported by the evidence, the judgment could not be reversed, because it is still right on the issue that the plaintiff was not in possession, and the court could not disturb a judgment which is not erroneous. We have already seen that the Supreme Court of the United States, in *House* v. *Mullen*, did reverse the judgment where there was no technical error—where the judgment was not erroneous in the sense in which counsel use the term for the purposes of this

argument—and on the sole ground that all the points covered by it would be *res adjudicata* and operate as an estoppel, whereas it appeared to the court that some of the points ought not to be considered as finally determined, which, upon the record as presented, would be concluded. This reversal, doubtless, proceeded upon the idea that the judgment was broader in its scope and more advantageous to the plaintiff than he was entitled upon the record to have it. So in this case, if the defendant in the former action obtained a judgment covering the entire merits when, in fact, either upon the issues found, or upon the issues correctly found, after determination of the appellate court, that other issues were improperly found, he ought only to have had judgment of non-suit or dismissal without prejudice, the appellate court would undoubtedly have reversed or modified the judgment and the latter might be done under the practice in Nevada. This would certainly be doing no vain thing, as insisted by counsel, but doing what a party would be legally entitled to claim at the hands of the court. The court would have no discretion to allow a judgment to stand which would conclude a further litigation of issues, that they were satisfied from the record ought not to be concluded, simply because the judgment in its present form might, also, give proper effect to the determination of other issues properly determined.

Under the system of practice in Nevada at the time, there were two appeals allowed, one from the judgment and one from an order granting or denying a motion for new trial, wholly independent of each other, and which might be taken separately or together, and upon either of which the judgment in a proper case might be modified or reversed. Upon an appeal from a judgment, only questions of law affecting the validity of the judgment could be considered. The facts could not be reviewed. If a party desired to have the facts reviewed, it was necessary to move for a new trial, and to prepare a statement as the basis of the motion, specifying the precise issues or points upon which the evidence was insufficient to sustain the verdict or finding, and to insert all the evidence bearing upon that precise point, and no more. Upon a denial of the motion for a new trial, the party had his appeal; and the

statement for new trial constituted the record upon which the appeal on the points specified was heard. Should the verdict or findings be found to be unsupported by the evidence wholly or in part, it might wholly, or to the extent found erroneous, be set aside. If the finding set aside is material to support the judgment, the judgment would necessarily be reversed. But if the other findings, not disturbed, are still sufficient to sustain the judgment, the judgment would not, necessarily, be reversed, but it doubtless might be. If not reversed, the vacating of the findings on some of the issues not necessary to sustain it would take those issues out of the operation of the rule relating to *res adjudicata*, because they would appear not to have been determined. Thus, in the case in hand, suppose there had been another express finding, that the plaintiff in the former action was not in possession at the commencement of the action, and on motion for new trial, or on appeal from the order denying a new trial, the court should be satisfied that the finding as to the adverse possession was not supported by the evidence, but that the finding of want of possession at the commencement of the action was correct, the finding on the issue as to adverse possession could be set aside without disturbing the other findings. But the judgment, if correct on the remaining issues need not be disturbed, or if too broad in its scope it could be modified and properly limited. Thus the rights of the parties could and would be protected. New trials as to some particular issues were often granted, even under the old system of practice, without disturbing the verdict or findings on other issues. (*Wiggins* v. *Smith*, 54 N. H. 213, 223-4; *Robbins* v. *Townsend*, 20 Pick. 351; *Winn* v. *Columbian Insurance Co.*, 12 Pick. 288; *Hutchinson* v. *Piper*, 4 Taunt. 555.) The practice in California and Nevada affords still greater facilities for pursuing this course, as is sometimes done. (*Argenti* v. *San Francisco*, 30 Cal. 459.) Doubtless, if it was more frequently done, it would greatly redound to the advantage of the parties, and conduce to the administration of justice.

But in this case, if the finding upon adverse possession should be set aside, as we have seen, there would be no finding at all on the issue as to plaintiff's possession at the commencement of the action, as that fact is only inferred from

the finding on the larger issue of adverse possession for a period of time covering the commencement of the suit, and the judgment would necessarily fall on the vacation of this finding, unless the other facts found also show the better right to be in defendant. The difficulty suggested, therefore, if any there be, could not apply to this case, and the argument is without force here, whatever might be said had there been an express finding on the other issue. In this case, as we have seen, there was an appeal from the order denying a new trial upon the issue as to the adverse possession, and the Supreme Court held the finding to be amply supported by the evidence. Thus, it is manifest that the power of the courts is ample by vacating one or more of the findings, and by reversing or modifying judgments on appeal so as to restrict their operation, to fully guard and preserve all the rights of litigants without encroaching upon the application of the wholesome doctrine of *res adjudicata*. *Speyer* v. *Ihmels*, 21 Cal. 280, 288–9, is another example of the reversal of a judgment technically correct on the record for the protection of the rights of the parties. Upon my view, therefore, there is nothing either upon authority, or upon principle, to take the case out of the rule of estoppel invoked by defendant. If I am right thus far, then it was finally and conclusively determined in the former action between the same parties that the defendant had the title as against the complainant; for the adverse possession for the time prescribed, not only barred the action to recover the possession, but vested the title as against complainant in the adverse possessor—the defendant. See *Arrington* v. *Liscom*, 34 Cal. 380–85, and the numerous cases there cited; *Cannon* v. *Stockmon*, 36 Cal. 540; and *Leffingwell* v. *Warren*, 2 Black, 605, where it is said by the Supreme Court of the United States that "the lapse of time limited by such statutes not only bars the remedy, but extinguishes the right and vests a perfect title in the adverse holder." A title so acquired will be quieted in the adverse holder on a bill in equity for that purpose, even against the holder of the paper title barred. (*Arrington* v. *Liscom*, 34 Cal. 386; *Alexander* v. *Pendleton*, 8 Cranch, 462.) The latter case, and the statutes under which it arose, were fully examined in *Arrington* v. *Liscom*. The other findings, also, seem to show title in the defendant.

It is further argued, on the part of the complainant, that the Statute of Limitations does not apply, because the title is in the United States, and such statutes do not run against the government; and *Gibson* v. *Chouteau*, 13 Wal. 92, is cited to sustain the position. But this case can have no application, for, as we have seen, the party who is the owner of the mining claim as against everybody but the United States, under the laws of the State or Territory, and the rules and regulations of the locality embracing the mine, irrespective of the act of Congress, is the party entitled to a patent; and the Statutes of Limitations of the State or Territory applicable to the subject themselves constitute a part of the laws by which the right to a mining claim is to be determined, for the purpose of ascertaining who is the party upon whom the right to purchase is conferred by the act of Congress. Such statutes, as we have seen, are expressly recognized by section 13 of the act of Congress as a part of the laws by which the right to a patent is to be determined.

So, again, it is urged that there was a trust, or confidence, reposed in the defendant and its grantors by complainant and its grantors, as tenants in common, which precluded the defendant from acquiring the title except for the benefit of all. This proposition is also untenable. According to the allegations of the bill there was a valid parol partition and segregation of the interests of the parties executed and followed by exclusive possession in pursuance of such partition. Such partitions are doubtless, valid. (*Long* v. *Dollarhide*, 24 Cal. 218.) Thus the parties by this partition ceased to be tenants in common, and forever after dealt at arm's length. Besides, the taking possession of the whole under conveyance from the former locators, claiming to own the whole, and excluding the complainant and its grantors, was a hostile act, which constituted an ouster, and set the Statute of Limitations in motion. It certainly will not be claimed that one tenant in common can not oust his co-tenant and by long-continued adverse possession bar his right. But, as we have seen, the parties had ceased to be tenants in common.

After a careful consideration of the case, I am satisfied that the right of the defendant as against the complainant was conclusively adjudicated in the former action, and that the

patent properly and rightfully issued to the defendant in its own right. It is, therefore, unnecessary to consider the question as to the conclusiveness of the patent upon the other grounds argued. If, however, the procuring of a patent in a proceeding in all respects regular in its forms in the mode pointed out by this statute, where no fraud has intervened in the course of the proceedings, can not be regarded as a proceeding *in rem*, or in the nature of a proceeding *in rem*, and be conclusive upon all the world, then, in my judgment, the statute ought to be speedily so amended as to make it such a proceeding and conclusive. So, also, if there is any case wherein the doctrine of *res adjudicata* should be carried to its utmost limit, or where the Statute of Limitations should be rigorously applied, it is this class of cases. There certainly can be no class of cases wherein it is more to the interest of the public that there be an end of litigation. Happily, in this case, as I view it, the question of title appears to have been adjudicated within the most limited scope of the rule of law invoked. I can not close this opinion without expressing my obligations to the counsel on both sides for the very able, thorough and exhaustive printed arguments furnished—arguments every way worthy the importance of the questions involved and the very large pecuniary interests at stake.

Let the demurrer be sustained and the bill dismissed.

FREMONT ET AL. V. SEALS ET AL.

(18 California, 433. Supreme Court, 1861.)

Admissions in answer which negative denials. In case the admissions of an answer contradict its general denials the latter may be disregarded.

Possessory claim can not defeat patented title. Title resting upon mining rules and regulations can not avail against a title held by patent from the United States, confirming a Mexican grant, which patent carries with it the ownership of the minerals which the premises contain.

Miners not actual settlers. The eleventh section of the act, "For the protection of actual settlers," etc., can not be invoked by miners engaged simply in extracting gold from a quartz vein.

Admissions in plea of limitation. The defendants in an action of ejectment pleaded occupation and possession by themselves for more than five years last past and for more than "two years from the date of the issuance of the patent" to plaintiff. *Held*, that this was an admission that plaintiff was seized of the premises within five years.

Appeal from the thirteenth district.

The facts appear in the opinion of the court. Defendants appeal.

E. COOK, for appellants.

C. T. BOTTS, for respondents.

FIELD, C. J., delivered the opinion of the court, BALDWIN, J., and COPE, J., concurring.

The court below rendered judgment for the plaintiffs upon the pleadings in the case, and the only question presented for consideration relates to the correctness of its ruling in this respect. The action is ejectment for the possession of certain premises in Mariposa county, title to which the plaintiffs assert under a patent of the United States, issued to Fremont, bearing date on the nineteenth of February, 1856. The defendants in their answer deny, generally, the allegations of the complaint, and at the same time admit the issuance of the patent, and that it embraces the premises in controversy. They disclaim all interest in the premises except in a certain quartz vein which the premises contain, and this vein they allege was taken up by them, or by parties through whom they claim, and is now held, in accordance with the mining laws, customs and regulations respecting claims to quartz veins, established and in force in Mariposa county. They also allege that they, or the parties through whom they claim, have occupied and held their respective interests in the vein for more than five years "last past," and for more than "two years from the date of the issuance of the patent;" that they entered upon the same without "actual force or fraud," and that their "interests" were not then and have not been since inclosed by any other parties. They also allege fraud

and misrepresentation in the survey and location of the grant upon which the patent issued, which it is unnecessary to notice, as those matters were the subject of elaborate consideration in the case of *Boggs* v. *Merced M. Co.*, 14 Cal. 279, and were there held inadmissible against the patent in an action of ejectment.

The admissions in the answer negative its general denials, and the latter in such case may be disregarded and judgment asked upon the former, the complaint being verified. The patent carries with it the ownership of the minerals which the premises contain. Title resting upon mining rules and regulations can not avail against the paramount proprietor—the United States—and as a consequence can not against parties who claim by conveyance from the United States. *Moore* v. *Smaw*, 17 Cal. 200; *Boggs* v. *Merced M. Co.*, 14 Id. 280.

The eleventh section of the act "For the protection of actual settlers and to quiet land titles in this State," of March, 1856, can not be invoked by the defendants. That act was passed, as its title indicates, for the protection of settlers, and the eleventh section applies only to "persons settled upon and occupying any part of the land patented." The defendants are miners, engaged simply in extracting gold from a quartz vein. They are not "settled upon" their vein in the sense in which the words of the statute are used. They have not the settlement which the law contemplates and intended to protect. From the whole tenor of the act it is apparent that it was passed for the benefit of those who are desirous to build up homes in the country, and for that purpose are seeking in good faith lands for settlement and occupation.

Nor will the act of April, 1855, aid the defendants. Although they allege possession in themselves or the parties through whom they claim for five years "last past," and assuming for the purposes of this case that this is equivalent to an allegation of possession for five years before the commencement of the action, they admit the issuance of the patent to Fremont on the nineteenth of February, 1856, and thus that he was seized of the premises within that period.

Judgment affirmed.

THE GOLD HILL QUARTZ MINING CO., Appellant, v. ISH, Respondent.

(5 Oregon, 104. Supreme Court, 1873.)

Recognition of miners' rights by the government before the enactment of any express statute, stated.

Title in U. S. It is a conceded doctrine that mines of precious metals "belong to the eminent domain of the political sovereignty."

By the mining act of 1866 the general government extended to all in possession of mining claims, and to all subsequently locating and denouncing mines containing the precious metals, a guaranty of protection in their occupancy so long as the mines are operated and worked.

[1] **Locator not compelled to patent.** There is nothing in the mining act imposing an obligation on the locator of a claim to proceed and enforce a patent.

Facts of the case—Agricultural patent void as against pre-existing mining claim. The appellant held a lode mining claim located in 1865. In 1870, respondent procured an entry of the quarter section on which the farm was situated, upon which entry an agricultural patent issued to him in the same year. The application was unknown to the lode claimant who was at the time in possession working the claim. *Held*, that the patent was void as to such mining claim and passed no title thereto; Second, that as the patent was void as to such claim its holder could not be declared a trustee for the rightful occupant.

Mineral lands. The returns of the surveyor are not conclusive as to the mineral character of lands.

[2] **"Known mineral deposits"—**[3] **Notice of possession.** Open and notorious possession (by mining) is sufficient to charge an applicant for patent with notice of the mineral character of land and to bring such land within the description of "known mineral deposits."

Appeal from Jackson County.

This suit was instituted to quiet the title to and enjoin the respondent from asserting any rights in and to a certain gold-bearing quartz lode situate in Jackson county. The complaint alleges that Henry Klippel, John McLaughlin, Charles S. Drew, N. C. Dean, Thomas Chavner and John E. Ross, on December 5, 1865, located six claims upon the said lode in accordance with the provisions of the State laws and the local

[1] *Chapman* v. *Toy Long*, 1 M. R. 497.

[2] *Sullivan* v. *Iron Silver Co.*, 109 U. S. 550; *Reynolds* v. *Iron Silver Co.*, 116 U. S. 687.

[3] *Lentz* v. *Victor*, 12 M. R. —.

laws and customs of miners. On December 11, 1865, the said parties filed articles of incorporation under the general laws of the State. The name of the incorporation was declared to be "The Gold Hill Quartz Mining Company;" the capital stock was fixed at $60,000, and the object was the working of the said lode. The company was duly organized, the stock-books opened and the stock subscribed. Contemporaneous with the filing of the said articles of incorporation the parties aforesaid duly transferred their claims to the said company. Ever since said transfer, and up to July 8, 1871, the said company were in possession of said claims, working said lode by driving tunnels, etc., for the purpose of procuring the quartz rock and extracting the gold therefrom, and had, up to said date, expended thereon $1,090. The possession of the said company was open and notorious, and the respondent had actual notice thereof, and of the character and extent of the appellant's claims.

On June 15, 1870, respondent applied to the officers of the proper United States land office to purchase the west half of the northeast quarter, and east half of the northwest quarter of section 14, township thirty-six south, of range three, west of the Willamette meridian, upon which the lode in controversy is situated, and having been allowed to purchase said lands as agricultural lands, a patent therefor was issued to respondent on August 11, 1870. The said patent was recorded July 8, 1871, and until said date the appellant had no notice of the application for and purchase of said lands by the respondent, or that respondent had any claim to or interest in the same.

The respondent demurred to the complaint. After argument the court below sustained the demurrer and dismissed the complaint with costs.

From the order dismissing the same this appeal is taken.

J. D. FAY and W. W. THAYER, for appellant.

B. F. DOWELL and H. KELLY, for respondent.

By the Court, MCARTHUR, J.

The claims upon the gold-bearing quartz lode in contro-

versy, were located and taken up in the year 1865 in accordance with the provisions of the act of the Legislative Assembly of the State of Oregon, approved October 24, 1864, and the acts amendatory thereof. They were "opened up" and operated under the State laws for a number of months prior to the passage of the act of Congress of July 26, 1866, commonly called the "Mining Act." This act was the first direct and positive recognition on the part of the general government of the right of the citizen to explore the public domain for the precious metals, and to denounce and operate mines when found. Anterior to the passage thereof, the general government, in carrying out a policy redounding to the public good, tacitly consented to the search for and development of the mines, and the courts, applying what has been often denominated "the common law of the mines," uniformly protected the rights of those engaged in mining for the precious metals. They recognized the binding force of the local laws, customs and usages of the miners, in all cases when those local laws, customs and usages did not conflict with written constitutions or legislative enactments. Taking into consideration the condition of the country and the importance of encouraging mining operations, and the non-action of the general government, they held that those engaged in mining for the precious metals enjoyed a species of franchise in the mines, and that they held the same free from all molestation or interference of all parties, save the general government. That the general government has the exclusive right to control the mines has never been seriously questioned; the principle being conceded that mines of precious metals belong to the eminent domain of the political sovereignty, as well under the laws of Spain as by the common law of England and public law of the United States. All the reported cases in California and Nevada lead to the conclusion, that the non-action of the general government raised such a presumption of license to those engaged in mining for the precious metals, as to give them a standing in the courts to assert their rights and redress their wrongs against all persons except the general government. The right of mining for the precious metals is a franchise, and the attending circumstances raise the presumption of a general grant from the sovereign of the privilege. (*Conger* v. *Weaver*, 6 Cal. 548; *Merced M. Co.* v.

Fremont, 7 Id. 327; *Hill* v. *King*, 8 Id. 338; *McKeon* v. *Fisbee*, 9 Id. 142; *Partridge* v. *McKinney*, 10 Id. 183; *State* v. *Moore*, 12 Id. 70; *Curtis* v. *Sutter*, 15 Id. 263; *Hughes* v. *Devlin*, 23 Id. 506; *Horn* v. *Jones*, 28 Id. 202; *Pralus* v. *Jefferson M. Co.*, 34 Id. 559; *Correa* v. *Frietas*, 42 Id. 340.)

Accepting this as a postulate, it follows that the general government itself could not equitably interfere with or abridge the rights of the miner. We are of opinion that "there are equitable circumstances connected with these mining claims that are clearly binding upon the conscience of the governmental proprietor that must never be disregarded. Rights have become vested, in virtue of the license, that can not be divested without a violation of all the principles of justice and reason." In *Sparrow* v. *Strong*, (3 Wall. 104). Chief Justice Chase used the following forcible language: "We know that the territorial legislature (of Nevada) has recognized by statute the validity and the binding force of the rules, regulations and customs of the mining districts. And we can not shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have spring up, employing many millions of capital and contributing largely to the prosperity and improvement of the whole country." The decision quoted from was rendered in December, 1865, and is a clear recognition by our highest judicial tribunal of the underlying principle upon which rests the rules governing this species of property, which have had practical operation for nearly a quarter of a century. It follows, then, that the locators and operators of the claims upon the quartz lode in controversy, were invested with a franchise which the courts would protect and uphold. Thus they stood before the passage of the act of Congress of July 26, 1866. By this act the mineral lands of the public domain, both surveyed and unsurveyed, are declared to be free and open to exploration and occupation to all citizens of the United States, and those who have declared their intentions to become citizens, subject to such regulations as may be prescribed by law. Any person or association claiming a vein or lode of quartz rock in place, bearing gold, silver, cinnabar or copper, who have expended in improvements thereon not less than

one thousand dollars, and have occupied and improved the same according to the local customs or rules of miners in the district, and in regard to which there is no controversy or opposing claim, may acquire title to the same by filing a diagram, in the local land office of said claim, giving notice and performing such other acts as are prescribed by law. As has before been stated, this act was the first direct and positive recognition on the part of the general government of the right of the citizen, and the alien who had declared his intention to become such, to explore the public domain for the precious metals, and to denounce and operate mines when found. Whatever difference of opinion may exist as to the tenure by which mining claims were held prior to the passage of this act of Congress, it is clear that, by the act, the general government extended to all in possession of mining claims, and to all subsequently locating and denouncing mines containing the precious metals, a guarantee of protection in their occupancy so long as the mines are operated and worked. The lode in controversy was, when "claimed," situate upon surveyed lands, belonging to the general government. Pursuant to instructions, the lands were sold as agricultural lands, and patented to Ish on August 11, 1870. The application to purchase was made subsequent to the passage of the act of 1866, and at a time when the possession of the appellant was open and notorious. Thus the adverse interest of Ish, if any interest he has, did not accrue until after the passage of the said act, and was therefore in violation of the guarantee of occupancy created by the first section thereof. But Ish obtained no interest in the mining claims on the lode by the patent. True, by the patent he obtained a given quantity of agricultural lands, and the lode is situate upon said lands, but the known deposits of precious metals did not pass by the patent, for they are expressly reserved from sale under the preemption and other land acts. The only law under which patent to mining claims, either lode or placer, can be obtained, is the act of 1866, and the amendments thereto. The fact that the claims of the appellant were not segregated and listed as mineral lands, can not avail the respondent. Segregation, when required, must be made by the surveyor; and to hold that the failure of the surveyor to fully discharge his duty

could operate to defeat the rights of the appellant, would be violative of the plainest principles of justice. Moreover, the returns of the surveyor are not conclusive as to the character of the lands, for the commissioner of the general land office, in carrying out the policy of the general government in the disposal of the public lands, allows affidavits as to the character of the lands to be made in impeachment of the returns of the surveyors. The open and notorious possession of the appellant was sufficient to charge the respondent with notice of the character of the lode, and also to bring the lode within the description of "known mineral deposits." Nor are the rights of the appellant forfeited, nor in the least abridged, by failure to procure a patent for the claims upon the quartz lode. "It is understood," says the commissioner of the general land office, in the instructions to the local land offices, "that there is nothing obligatory on claimants to proceed under the statute (act of 1866), and where they fail to do so, there being no adverse interest, they hold the same relation to the premises they may be working which they did before the passage of the act, with the additional guarantee that they possess the right of occupancy under the statute. (Zabriskie's Land Laws, 207.) Before leaving this case it becomes necessary to allude to the prayer of the complaint, and to express our views in relation to the proper relief to be afforded. The prayer asks for a decree of the circuit court declaring the defendant a trustee for the plaintiff; that the defendant be required to execute a good and sufficient deed to the plaintiff of the land included within the boundaries of the claims, and also for a perpetual injunction inhibiting the defendant from setting up any title to said claims.

Inasmuch as Ish never obtained title to the lode, he can not be decreed to be trustee for the plaintiff, nor can he execute a deed conveying to the plaintiff the legal title. The proper relief to be granted is an injunction order perpetually enjoining and inhibiting Ish, and all persons claiming or to claim by or through or under him, from asserting any title to the lode, and also from in any manner interfering with the plaintiff in entering upon and working the claims thereon.

Decree reversed.

[1] McGARRAHAN v. THE NEW IDRIA MINING CO.

(49 California, 331. Supreme Court, 1874.)

[2] **Recitals of fact and conclusions of law in patent.** The officers of the government and the grantee, as well as those in privity with him, are bound by the recital of facts contained in the patent of the United States; but an opinion of the executive officers in respect to matters of law, as indicated either by the ultimate act of issuing the patent or by recitals inserted in that instrument is not conclusive.

[3] **Patent based on statute.** Neither the president nor any other officer of the government has power to dispose of the public domain or cause the issue of a patent without the authority of some statute of the United States.

Void patent based upon Mexican grant not confirmed. Under the act of Congress of 1851, "To ascertain and settle private land claims in California," a patent can only issue after the final confirmation of a Mexican grant, and a patent issued before such final confirmation is void.

Appeal can only be dismissed by appellate court. The District Court of the United States having granted an appeal to the Supreme Court, has no power to set its order aside. The jurisdiction of the Supreme Court attaches upon the appeal being granted, and only on application to the Supreme Court could the appeal be dismissed.

Appeal from the District Court, Twentieth Judicial District, County of Santa Clara.

The case was thus: On the 9th day of February, 1853, Vicente P. Gomez, as claimant, filed a petition with the commissioners to settle private land claims in California, asking that the board confirm to him a tract of land of four square leagues, called "Panoche Grande," situated in the then county of San Joaquin. He founded his claim upon an alleged grant made to him in the year 1844, by Manuel Micheltorena, then governor of Upper California. On the 6th day of March, 1855, the board of land commissioners rejected the claim. Gomez appealed to the District Court for the Southern District of California, and that tribunal, on the 5th day of June, 1857, reversed the decision of the board of land commission-

[1] Affirmed, 11 M. R. 666.

[2] *U. S.* v. *Maxwell Land Grant*, 21 Fed. 19.

[3] *Schwenke* v. *Union Co.*, 7 Colo. 512; *Deffeback* v. *Hawke*, 115 U. S. 392.

ers, and confirmed the claim, but the decree was not signed by the judge and entered until the 5th day of February, 1858.

On the 25th day of August, 1862, the District Court of the United States made an order in the cause allowing an appeal to the Supreme Court of the United States. At the December term following, the district court made an order vacating and setting aside the order of August 25th, allowing an appeal, and denying the motion of the district attorney for leave to take an appeal. The rancho was surveyed by the surveyor-general, under the act of Congress approved June 2, 1862, and a plat with a certificate of the survey, authenticated by the surveyor-general of public lands in California, on the 11th day of September, 1862, was presented to the commissioner of the general land office, and a patent was demanded. The secretary of the interior, on the 29th of December, 1862, rendered a decision on the application, in which he held that the decree of the district court had become final, and that a patent should issue. The foregoing facts were recited in the recorded patent hereinafter mentioned.

On the 4th day of March, 1863, the matter of the issuing of a patent again came before the secretary of the interior, and he again held that a patent should issue. On the 14th day of March, 1863, there was recorded in volume four of records, kept in the general land office at Washington, for the recording of patents of the United States issued for California confirmed Mexican grants, a patent in due form, dated March 14, 1863, and signed "Abraham Lincoln, by W. O. Stoddard, Secretary, acting recorder of the general land office." On the 25th day of July, 1870, there was written across the face of said record the following:

"DEPARTMENT OF THE INTERIOR,
General Land Office, July 25, 1870.

"The record from pages 312 to 321 inclusive, was made in accordance with the custom at the time, in anticipation of the original being submitted to the officers whose duty it is, under the law, to sign land patents, but an order, dated March 13, 1863, having been received from the acting secretary of the interior, to suspend the execution and delivery of a patent, under the decision of the department of the 4th of March, 1863, until further advised in the case by the secretary, the form of patent which had been prepared, and from which

the aforesaid record was made, was not submitted for signature, and has never been dated, signed nor delivered.

"Jos. S. WILSON, Commissioner.

"J. N. GRANGER, Recorder."

On the 22d day of December, 1857, Gomez, the grantee, executed to the plaintiff, McGarrahan, a deed, conveying to him all his, said Gomez's, right, title and interest in the said rancho "Panoche Grande." On the 11th day of July, 1870, and fourteen days before said entry was made across the face of the record, the plaintiff demanded an exemplification of said record, but it was refused. On the 24th of March, 1873, the commissioner of the general land office issued an exemplification of said record, but, in his certificate thereto annexed, made the following statement: "And I further certify that the original instrument set forth in the above named pages of said volume four was never executed by the President of the United States, nor delivered to the grantee, and that said original instrument is now on file in this office, but neither it nor the copy thereof in said volume four, is regarded or treated as a part of the office records of the general land office."

This was an action of ejectment to recover a portion of said rancho containing four hundred and eighty acres, known as the New Idria Quicksilver Mine. The rancho, at the time of the commencement of this action, was in the counties of Fresno and Monterey.

The defendant had judgment in the court below, and the plaintiff appealed.

B. S. BROOKS, J. P. HOGE, SOL. A. SHARP and W. H. PATTERSON, for the appellant.

S. M. WILSON, for the respondent.

By the Court, McKINSTRY, J.

For the purpose of this decision only, we shall consider the record in the volume in the general land office at Washington, kept for the recording of patents of the United States issued upon California confirmed Mexican grants, as constituting the original patent.

The patent is evidence of the series of proceedings recited in it; and as the deed of the United States, took effect by relation as of the date of the presentation of the petition for confirmation of the grant to the board of land commissioners: *Leese* v. *Clark*, 18 Cal. 535. Indeed, it is only by virtue of this application of the doctrine of relation that the plaintiff can hope to recover, since his deed from Gomez, the original grantee, only purports to convey "the right, title and interest" of Gomez at the date of the conveyance, which preceded several years that of the alleged patent: *Gee* v. *Moore*, 14 Cal. 472; *Kimball* v. *Semple*, 25 Cal. 440; *Morrison* v. *Wilson*, 30 Cal. 344. The patent, as we have seen, is not only the deed of the United States—it is evidence of the proceedings recited in it, and is a solemn record of the government, of its action and judgment, with respect to the title of the claimant. As such it imports absolute verity: *Teschemacher* v. *Thompson*, 18 Cal. 11. It follows that both the officers of the government and the grantee, as well as those in privity with him, are bound by the recital of facts contained in the patent.

Neither the president, however, nor any officer, has other power to dispose of the public domain, or to sign, or cause the seal of the land office to be affixed to patents, than such as is conferred by statutes of the United States: *Parker* v. *Duff*, 47 Cal. 554.

Under the act of Congress of 1851, "To ascertain and settle private land claims in California," a patent can only issue after the final confirmation of a Mexican grant. While therefore the recitals of fact are binding on all concerned, an opinion of the executive officers in respect to matters of law, as indicated either by the ultimate act of issuing the patent or by recitals inserted in that instrument, is not—and from the nature of the powers and duties of such officers can not be—conclusive: *Foscalina* v. *Doyle*, 47 Cal. 437,

It appears from the alleged patent that on the 25th of August, 1862, an order was made in the district court allowing an appeal to the Supreme Court of the United States in the case *The United States* v. *Gomez;* and that at the December term, 1862, the district court made an order purporting to set aside the order of the 25th August.

The order of the 25th day of August, 1862, was valid and effectual to transfer the cause to the Supreme Court of the United States for final disposition, subject only to the appeal being dismissed for want of pro ecution, without prejudice to a new appeal within five years after the decree of the district court: *U. S.* v. *Gomez*, 3 Wall. 753; *McGarrahan* v. *Maxwell*, 28 Cal. 89. It does not appear in the patent, nor in the findings of the court below, that any disposition has been made of the appeal of the 25th of August by the Supreme Court of the United States. On the appeal being granted by the district court the jurisdiction of the Supreme Court attached, and the appeal could be dismissed only on application to the Supreme Court. The district court could not, just before the expiration of the five years, set aside its order granting an appeal, and thus deprive a party of a sacred right guaranteed by the statute. An appeal constitutes a bar to the execution of the judgment of the inferior court: *United States* v. *Pacheco*, 20 How. 263. Its effect is to suspend all proceedings in the court below: *Thornton* v. *Mahoney*, 24 Cal. 569; *McGarrahan* v. *Maxwell*, *supra*. It must be effectual to prohibit any action of the district court setting aside an order which has already operated to transfer the cause to the appellate tribunal.

The claim to the rancho "Panoche Grande," was not finally confirmed, therefore, when the alleged patent was issued, and the same is void.

Judgment affirmed.

Mr. Chief Justice WALLACE, being disqualified, did not sit in this cause.

KAHN v. THE OLD TELEGRAPH MINING CO. ET AL.

(2 Utah, 174. Supreme Court, 1877.)

General issue in ejectment. Under the denial of the title of the plaintiff in the answer, the defendant can give in testimony any title in himself at the commencement of the suit, without specially pleading it.

Title acquired after suit brought—What to contain. Any title to the premises in dispute that accrued to the defendant after the commencement of the suit must be set up by a supplemental answer; otherwise, defendant can not avail himself of it.

Title lost after suit brought. Where it is claimed that the plaintiff's right has terminated during the pendency of the action, the fact can not be shown unless pleaded by a supplemental answer by defendant; otherwise if the fact appears from the plaintiff's own evidence.

[1] **Patent after suit brought.** A patent from the government to the defendant for the premises in dispute, issued after the commencement of the suit, must be pleaded by a supplemental answer.

A patent when granted relates back to the first initial valid step, which is the foundation of the right and in pursuance of which the patent is issued.

Idem—Location—Certificate in aid of patent. As a location notice in the acquisition of mineral lands is the first step in that direction, the same is proper evidence in connection with the patent to show the claim to which the patent refers.

Distinction between expert and ordinary testimony. Expert testimony is given on questions of science, skill or art. On matters of common observation the witness states the facts only but the expert is allowed to add his opinion.

On the issue of vein continuity expert testimony is admissible.

Opinions of experts are not the safest evidence, but when they constitute the best available form of evidence, are resorted to from necessity.

Defendant not confined to one title. In ejectment, under a claim of the defendant that he is the owner of the vein in controversy, he can support such claim by showing all the titles he may have covering the ground sued for.

Distinction between law and equity inherent. While the forms of action have been abolished by the code, the inherent distinction between legal and equitable causes of action, and the remedies appropriate to each, are not changed.

[2] **A patent may be attacked at law,** where void on its face or issued without authority, or against authority, or where the government had no title; but where the government had title and it passed by the grant, it can not be attacked at law upon the pretense either of fraud or superior equities.

The want of authority which will make a patent void is a total want of authority to issue the same for the subject of the grant, and not a latent impropriety in exercising the authority by reason of unknown impositions moving to its exercise.

An equitable defense may be set up in ejectment, but such defense must contain all the essentials of a bill in equity, and the issue thus made is triable by the court, without a jury, as an equitable issue.

This rule does not avail a plaintiff who bases his claim on a legal title, and is met by a superior legal title of defendant; in such case he can not be permitted to attack the title of defendant on purely equitable grounds.

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[1] *McEvoy* v. *Hyman*, 25 Fed. 539.

[2] *Meyendorf* v. *Frohner*, 5 M. R. 560; *Boggs* v. *Merced Co.*, 10 M. R. 334; *Wells* v. *Francis*, 7 Colo. 396; *Poire* v. *Wells*, 6 Colo. 406.

In ejectment the question is as to who has the better title; but before a defendant can prevail on an inferior or equitable title, he must first become an actor and invoke equitable affirmative relief.

Statutory denials of answer. Where the statute provides that the allegations of the answer shall be deemed to be denied, this does not take the place of a bill in equity on which to grant affirmative relief.

Scope of a mining patent. A patent to a mining claim passes whatever title the government had to the surface and any vein or veins beneath it not otherwise granted; and its issuance presumes a compliance with the mining laws.

Grantee not estopped—Buying one's peace. One who purchases an adverse title to his premises is not estopped from denying that such title is not good. One has a right to "buy his peace."

A notice of location of a mining claim should contain a description of the premises located, and the same should be marked on the ground.

Appeal from the Third Judicial District Court.

The facts appear in the opinion.

ROBERTSON, MCBRIDE & HOFFMAN, for appellant.

BENNETT & HARKNESS, for respondents.

EMERSON, J., delivered the opinion of the court.

The appellant, who was plaintiff in the court below, in April, 1876, brought an action of ejectment against the respondents, to recover an undivided one third of the Montreal mining claim, and in his complaint sets out a possessory title under a location of the claim on the 6th day of June, 1873, and a subsequent compliance with the mining laws and customs by the locators and their grantees. The appellant alleged title by a grant of one third (five hundred feet) from two of the locators, on the 19th day of December, 1874; an ouster by respondents, April 10, 1876, and a subsequent unlawful withholding.

The complaint also contains a second and equitable cause of action for an accounting for one third of the profits of working the mine and asking both a provisional and a perpetual injunction and a receiver.

In May, 1876, the respondents answered to the first cause of action by denying the title of the appellant, and the alleged possession and ouster, and to the second cause of action by further setting up a possessory title to an older mining claim called

the No You Don't, and that the alleged Montreal vein, and the only vein in that claim, was a part of the No You Don't vein, and belonged to the respondents.

In this part of the answer the respondents admitted they were in possession of the vein, claiming to own it, but they set up no claim of title to Montreal surface ground.

The facts set out in the answer to the second cause of action were pleaded both as a defense, and as a counter-claim and basis for affirmative equitable relief, quieting their title, and for an injunction.

To this part of the answer, as a counter-claim, the appellant interposed a demurrer, which was not disposed of until after the trial of the law issue.

On the 10th of March, 1877, the respondents, on motion, were permitted to file a supplemental answer, in which they set up that since the commencement of the action they had acquired patent title from the United States for the No You Don't, the Nez Perces Chief, the Third Westerly Extension of the Telegraph, the Roman Empire, and the Montana mining claims, and also a certain interest in the Grecian Bend mining claim; that all these were on the same lode or vein; that the course and apex of the lode was in the No You Don't claim on the top of the hill, and that the parallel end lines of the No You Don't claim extended vertically and continued in their own direction down the dip of the vein toward the Montreal mining claim, including all of the vein in the Montreal; also, that the other claims mentioned, with a like extension of the end lines, would include, some of them all and others a portion of the vein in the Montreal. That a portion of the surface ground of the Montreal was within each of the Montana, the Roman Empire and the Grecian Bend mining claims, and that the Roman Empire embraced the Montreal discovery point.

The locations of these claims, excepting the Nez Perces Chief, are alleged to be prior to the location of the Montreal.

The motion for leave to file this supplemental answer was served by the respondents on the appellant, and a copy of the answer was served with the motion papers.

A jury trial was had in the Third District Court, commencing April 30, 1877, which resulted in a verdict and judgment for the respondents.

A motion for a new trial was made and overruled, and the appellant brings the case to this court on an assignment of various errors in law occurring at the trial.

Before the trial commenced the appellant filed his motion to strike out parts of the supplemental answer, on the ground that the parts mentioned in the motion were immaterial, redundant and irrelevant, constituted no defense, and that many of the facts existed at the time of filing, and were inconsistent with the original answer. The parts specified in the motion included the whole of the supplemental answer except a few introductory lines.

The refusal of the court to grant the motion is the first alleged error.

The Practice Act, C. L., § 1291, provides that "the plaintiff and defendant respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer; that the making of supplemental complaint or answer shall not be a waiver of the cause of action set up in the former complaint, or of the defense set up in the former answer."

C. L., § 1282, provides that, "if irrelevant or redundant matter be inserted in a pleading, it may be stricken out by the court on motion of any person aggrieved thereby."

It is also provided, C. L., § 1481, that "in an action for the recovery of real property, when the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact, and the plaintiff may recover damages for withholding the property."

The respondents in their original answer to the first cause of action had not set out any title in themselves. On the trial under that answer, they could have shown in themselves any title or titles sufficient or tending to defeat the action, and which they held at the time of its commencement. Had they then held the titles set out in the supplemental answer, it would not have been necessary to plead them specially, but as they accrued afterward, it was necessary to set them out specially, in order to comply with the provision of the statute

that the "facts material to the case," arising subsequent to the former pleading, must be alleged, and in order to enable the court, on motion, to see that the alleged facts are material. Neither could the respondents on trial, and without a supplemental answer, have put these patents in evidence, under § 1481, for the purpose of defeating the action from the date of the patents, and limiting a recovery of damages to that time: *Moss* v. *Shear*, 30 Cal. 467; *Hardy* v. *Johnson*, 1 Wall. 374; *Bagley* v. *Ward*, 37 Cal. 121; *Reily* v. *Lancaster*, 39 Cal. 354.

These decisions are made under the same statutes as ours, and in effect limit the words "but if it appears that his (plaintiff's) right has terminated during the pendency of the action," occurring in § 1481, to cases where it so appears on the plaintiff's evidence, and they expressly decide that the affirmative fact that the plaintiff's right has ceased pending the action can not be shown as a defense unless pleaded supplementally.

It therefore appears that the respondents could have made no use of these patent titles unless they were pleaded in a supplemental answer.

The titles set out in the supplemental were not inconsistent with the original answer, which set out no special title in the respondents, and they were not immaterial because it is alleged each covers and grants some part of the demanded premises.

A patent from the United States for any portion of the premises in controversy can not be immaterial or irrelevant as evidence of title in an action of ejectment.

It is further argued that the supplemental is inconsistent with the original answer because it pleads several patents, and hence assumes as many different veins, while the original answer alleged one continuous vein from the No You Don't down to and beneath the surface of the Montreal. This last allegation is found in the answer to the equitable cause of action, and assuming that that answer constitutes a part of the pleadings on the law issue (a position not affirmed or denied) it is not clear that there is any inconsistency in this respect. This question will be more fully considered hereafter in connection with other alleged errors.

Another objection to the supplemental answer is that many of the facts existed at the time the original answer was filed. The supplemental answer does not plead as a defense anything but the subsequently acquired titles. In respect to the claims patented it does not allege their location, the citizenship of the locators, their subsequent occupation, and the performance of work or making improvements thereon, or any compliance with mining laws and customs, either specially or prior to the patent; nor is there any general averment in order to establish an independent possessory title under the mining laws. Neither on the trial did the respondents give any evidence of such compliance with mining laws, but in their instructions asked, they insisted that their patent titles were not only sufficient but conclusive evidence of title in the action. The only evidence of work done on these claims as assessment or statute work, appearing in the respondents' evidence, is in the cross-examination of respondent Holden, by appellant's counsel.

The locations of the patented claims are pleaded under a recital of their dates, and it is alleged the patents were issued on proof to the proper officers of a compliance with the mining laws. These facts are evidently stated for the purpose of giving relation to the effect of the patents as evidences of title, and for that purpose they were competent in a supplemental answer, although the facts existed prior to the original answer. In legal effect they were a part of the patent title.

These views render it unnecessary to determine whether as a question of practice the motion could be properly made at that time and in that manner. It is not the usual way to settle issues. It would be better practice to bring motions designed to affect the pleadings and settle issues to a hearing before the cause is called for trial. *Smith* v. *Countryman*, 30 N. Y. 655.

When the court permitted the pleading to be filed its materiality was passed upon, for it is only material facts which are allowed to be thus pleaded. The motion required the same court, and on the same state of facts, to review its former order, to which no exception appears to have been taken. At all events the appellant had and exercised the right to object to evidence under the pleading.

On the trial the respondents put in evidence the several

patents named, the location notices of the several claims patented, a chain of conveyances from the locators and their intermediate grantees down to the patentees and respondents, and proved that the applications for the several patents were made under the location notices offered and received in evidence.

To each instrument in these chains of title the appellant objected that it was immaterial, irrelevant and incompetent, and the second and third assignments of error are based on their reception in evidence.

In respect to the patents, the objection follows the motion to strike out the supplemental answer, and it has already been said that is not immaterial, and hence evidence tending to support it must be held material.

Patent titles, when granted, relate to the first initial valid step, which is the foundation of the right and in pursuance of which the patent is issued: *Stark* v. *Starrs*, 6 Wall. 402; *Yount* v. *Howell*, 14 Cal. 465; *Ely* v. *Frisbie*, 17 Cal. 250. Numerous cases to the same effect might be cited.

As the location is the first step in the acquisition of mineral lands and the foundation of the title thereto, the respondents following the allegations in their answer put these location notices in evidence. They are not set out in the record, but as chains of conveyances down to the patentees and respondents were put in evidence, it may be assumed that the respondents were not the locators, and if not, then the connection between the patent and the location notice was not complete, even for the purposes of relation, until these connecting evidences were put in. Without them the respondents would have patent title, but it would not appear that that title was connected with the location notices. For the purposes for which this evidence was offered it was clearly admissible and material, unless the argument that portions of it were repugnant to both the original and supplemental answers be well founded; and this question in connection with others will be hereafter considered.

The fourth assignment of error relates to the admission of what is called expert testimony.

Whether or not the witnesses were competent to speak as experts, was a question of law, to be decided by the judge on the trial. The evidence of their competency or otherwise is

not set out, but only a general statement embodied in the record giving the result of their testimony on this point, and from that general statement there does not appear to be any error in the ruling so far as competency is concerned. The objection to the testimony seems to be based on the ground that a full tracing was claimed by respondents between the No You Don't and the Montreal, and that the witnesses should only state what they saw in the connecting works, leaving the jury to determine the question of continuity without an opinion from the witnesses. In brief, that the subject matter was not a proper one for expert testimony.

Expert testimony proper is given on questions of science, skill or art, by persons educated or experienced, and deemed competent to speak concerning the matter in issue. Such persons may give their opinions in evidence, not only on facts within their own observation, but on facts detailed by other witnesses, or on a hypothetical case stated. They may also in certain cases, give their opinion as to the existence of latent, or invisible or unknown facts or things, from other facts indicatory of them. As a general rule, however, as to matters which are open to common observation, and in regard to which a jury are supposed to have knowledge or experience, the witness must state the facts only and may not give opinions. There are many exceptions to the last rule, and many cases in which witnesses having no special education or experience in the matter, and on subjects open to common observations, may state opinions; and these opinions, although sometimes classed as expert testimony, are not such, and rest on a different reason and necessity. In these cases, however, the witness is never allowed, like the expert, to state an opinion as to the existence of latent facts from the apparent ones, nor on facts related by other witnesses, nor on a hypothetical case, but only to give his opinion on facts observed by himself; and the witness is distinguished from the rest of the world, not by any special aptitude, but only by the opportunity he has had to see the subject-matter. In these cases, where the facts are too minute, numerous and evanescent to be given in detail, the witness, after stating his observations and describing the facts to the best of his ability, may state his opinion, which is the result of the grouping of those minute facts. Such is the

case in questions of handwriting, insanity, genuineness of a postmark, the state of health or of the affections of a person, the value or identity of property, the condition of a person as to sobriety or drunkenness, and numerous other cases. A witness who saw a person write but once, and that twenty years before the trial, has been allowed to give his opinion whether a signature was genuine.

In cases of handwriting, disputed identity and many other cases, it would be impossible for the witness to describe to the jury the difference between the different signatures, persons or animals, with sufficient minuteness to enable them to determine the case, and opinions must of necessity be taken. In this case the evidence on the question of continuity of lode is not brought up, and from what appears it is not easy to say, either from the pleadings or evidence, whether or not it appeared there were openings on the veins from the No You Don't to the Montreal, unless the works shown by the maps are assumed to be all on one vein, a point disputed by the appellant. If the openings on the veins were not continuous, it would be a case for expert testimony and opinions might be taken as deductions from what did appear. If the openings were in matter claimed to be continuous vein matter, still it has been the constant practice in this Territory and in California, to receive the opinions of witnesses in cases when the claim of continuity is disputed. If the subject-matter was one of common observation and of which a jury was supposed to have knowledge and experience, on a description of the mere facts, why did a large number of witnesses who saw these facts differ so widely in their conclusions? So far as the case appears from the record, there does not appear to have been any error in receiving the testimony of experts.

But if it was not a case for strictly expert testimony, it was one in which a bare statement of the facts observed by the witnesses would not give the jury sufficient knowledge to determine the issue. In such case it must first be assumed that the jury know what constitutes a mineral vein, what matter and quality of matter and appearances prove continuity; and then, that the witness can give the numerous and minute facts in evidence so clearly that the jury can get a full understanding of them.

While opinions are not the safest evidence, and are liable to lead to great abuses, when they constitute the best available form of evidence they must be resorted to from necessity.

It was admitted on the trial that the vein, from the Montreal up to certain points marked on the maps, was continuous. The respondents claimed it was continuous to the No You Don't discovery. Hence the point or points at which the continuity was contested must have been at or above those marked on the map, and the respondents were allowed to give evidence that the points marked were within the surface lines of the Nez Perces patent, and on the admission of this evidence the fifth error is assigned.

The appellant claims that this evidence is contradictory of the sworn allegations of the answer. The parties agree on the continuity up to certain points in the workings, and the effect was to confine the dispute to the ground above. It was surely competent for either party to show the court and jury the surface points vertically beneath which the agreed points in the under ground works were situated, and such is the whole scope of the evidence. It merely fixed the surface as well as underground points at which the dispute began, and had no tendency to contradict anything in the pleadings. This question, however, is argued on the supposition that the evidence tended to prove two veins, or was introduced as a foundation to give effect to the Nez Perces' patent, and hence was repugnant to the respondents' answer. While this effect of the evidence is not very obvious yet it will be considered in connection with the objections to the supplemental answer, and to the chains of title introduced by respondents, based on their alleged repugnancy to the answer, questions which have been passed by above. All these objections are on the claim that the respondents, inasmuch as they set up that the vein is continuous, and that the No You Don't patent carries it, can not show any other title to the demanded premises.

The appellant in his brief says the issue was on the continuity of vein.

The issue really was as to the ownership and right of possession of the demanded premises. Had the respondents held these patent titles at the commencement of the action, they could have put them in evidence, if they tended to prove title to any part of the premises in dispute; and if any one or all

of them covered the vein for the entire length of the dip, that fact could have been shown.

By pleading these titles specially and alleging all were on the same vein, but that one conveyed the whole of it, were they deprived of the right to use the other titles?

No case has been cited establishing any such rigid rule of pleading. The issue being as to the title, the respondents alleged they had it by various grants. It is true they alleged the vein was continuous, and one title sufficient; but the allegation that there was but one vein must be regarded as the opinion of the respondents. The evidence given shows that statement was a matter of opinion and belief, and not a well known visible fact apparent to common observation, and concerning which those who had opportunity for observation could not differ; for, at the trial, a large number of witnesses, and with the aid of a year's additional work and developments, subsequent to the making of the answer, did differ on this question.

The case is analogous to one of boundary. If a defendant is sued in ejectment, may he not plead that the demanded and other premises all belonged to his grantor, that he has three or more several deeds from the grantor, the first being for premises within the bounds of which lie the demanded premises—the second for a smaller tract, but including the demanded premises; and the third for a still smaller tract, but also including the demanded premises? There seems to be no repugnancy in these allegations, and if this question of boundary was one of doubt, and the defendant failed to establish that his first title included the disputed ground, there would seem to be no reason why he might not defend on the other titles.

The allegation that the Nez Perces Chief and Third Westerly Extension of the Telegraph claims were on the same vein, was in effect alleging that they held the vein if the No You Don't did not. There is a hypothesis in the position to this extent: the respondents say we own the vein under the No You Don't patent; if not under that, then under other titles.

There is no hypothesis on the issue of *ownership;* the allegation is positive on that point. The hypothesis only relates to which of two or more titles carries the premises, and in no wise prejudices the appellant, between whom and the respond-

ent the question is, who owns the premises—not under what particular title it is owned.

The sixth error assigned is on the exclusion of evidence offered by the a pellant to show the No You Don't location had been abandoned ; that the application for said patent was a fraud on the appellant, and the patent had been obtained on false proofs. This was offered to show that the respondents could claim no rights under that patent in this action.

The seventh assignment of error is on a like offer respecting the Roman Empire patent, but such offer does not appear in the record. The whole question, however, is raised by the single offer appearing.

It is manifest the appellant and respondents held widely different views as to the effect of the patent titles; the latter claiming they were conclusive evidence of title in the action ; the former that they were only *prima facie* evidence and could be attacked and shown to be invalid.

The Practice Act provides that there shall be but one form of civil action for the enforcement of private rights, or the redress of private wrongs, but the inherent distinction between legal and equitable causes of action, and the remedies appropriate to each are not changed: *Zeil* v. *Moritz*, 1 Utah, 283.

It is also provided, C. L., § 1263, that the only pleadings on the part of the plaintiff shall be the complaint and demurrer to the defendant's answer, and § 1290 provides that "the allegation of new matter in the answer shall, on the trial, be deemed controverted by the adverse party."

It is conceded that in an action of ejectment, in certain cases a patent of the United States may be shown to be invalid; instances are, if the patent is void on its face, or issued without authority, or its issue prohibited, or when the government by reason of a prior grant had no title. The distinction between such cases and those in which the patent is held to be conclusive evidence of title in an action at law is this: Where the government had the title and it passed by the grant, it can only be recalled or made subject to equitable interests of other parties by an action in equity brought for that purpose. In such cases, although fraud may have been practiced, or other parties hold superior equities, the patent is not void but only voidable in equity. If, however, the gov-

ernment does not have the title, or the issuance of the patent is unauthorized or prohibited by law, no title passes by the grant, and this fact may be shown at law or in any court in which the void instrument is produced as evidence of title. The adjudged cases in regard to the effect of patent title are too numerous to cite, but an examination of the cases cited by the respective counsel in this case will be sufficient to justify this principle of distinction. It is unnecessary to cite authority that a conveyance otherwise formal and between competent parties is only voidable at the instance of parties defrauded, and that if they acquiesce the conveyance is good, notwithstanding the alleged fraud. It is argued, however, that the patent was issued without authority, and was therefore void, if the No You Don't claim had been abandoned, or the other facts existed which the appellant offered to show. The want of authority which will make an instrument of this kind void, is a total want of authority to issue a patent for the subject of the grant, not a latent impropriety in exercising the authority, by reason of unknown imposition moving to its exercise, when the proofs authorizing the act are formal and sufficient.

The case on trial was strictly a law issue, tried as such before a jury, and in addition to the objections that a patent which passes title can not be impeached in such an action, and before a court so constituted, there are other serious objections arising out of the state of the pleadings. While it is conceded that, under the system of code pleading, an equitable defense may be set up in an action of ejectment, it is also well settled that such defense must contain all the essentials of a bill in equity, and the issue thus made is triable by the court without a jury, as an equitable issue: *Gibson* v. *Chouteau*, 13 Wallace, 92–103; *Basey* v. *Gallagher*, 20 Wall. 680; *Bruck* v. *Tucker*, 42 Cal. 349; 34 Wis. 486.

The appellant contends that he had no opportunity to attack the patents by his pleading, and that the statute controversion of the answer gave him the right to introduce evidence as fully as if he had brought an action in equity—that is, to show everything necessary to overcome the defense set up. This claim can not be maintained to such an extent. Under the statute the plaintiff can undoubtedly show

any matter strictly controverting the answer; but in so doing can not introduce into the case, by his evidence, a new cause of action. Yet such was the attempt here. The appellant had brought his action affirming he had the better legal right. On the trial he sought to recover on an equitable cause of action, which in effect admitted the superior legal title of the respondents, but claimed there were equitable grounds for subjecting that legal title to his better equities. A verdict of the jury for the appellant based on such grounds, followed by judgment, would leave the parties in an anomalous condition. There would be a verdict and judgment at law against the respondents while they held and continued to hold the better legal title.

There would be nothing on the record to show why this was given, and no judgment subjecting the legal title to the appellant's equity, by an injunction against enforcing it or by a decree for its conveyance, nor in fact anything to show why such a judgment had been rendered. The cases cited to show that an equitable defense might be set up establish nothing in favor of a plaintiff in such a case as the one before us, because as shown, an equitable issue is there made and tried as such, and before a court competent to give a judgment suitable to the demands of the case, and after that issue is tried then the legal issue is disposed of with the aid of the judgment of the court on the equitable issue, which, if it subject the legal title to the equity of the defendant, leaves the defendant with the better title on the trial of the legal issue.

Considering the peculiar nature of this action of ejectment, and that it is a question as to which has the better title, it would seem that before a defendant can prevail on an inferior or equitable title, he must first, in equity, subject the better title to him; and so are the authorities under similar statutes to those prevailing in this Territory: 15 Barb. 365; 34 Wis. 486; 35 Wis. 631.

In the case in the 15 Barb. Judge Hand says: "I do not understand there is any equitable defense, simply as a defense, in an action of ejectment. The effect of that might be to keep the legal title and the possession forever separate."

This case is followed by the others cited, in which it is in effect held, that where an equitable defense is set up in an

action of ejectment against a better legal title, it must not only be as a defense but as a counter claim. The defendant must become an actor and ask affirmative relief. This will be made more apparent by a reference to the nature of the proceedings before the code. Had the appellant brought an action of ejectment on a better title, the respondents, under the old system of pleading, must have stayed the action, filed their bill in equity, become actors asking affirmative relief, and subjecting the legal title to their equitable rights. These principles are not changed by the code. There are, therefore, no analogies to support the appellant's proposition in the provision allowing equitable defenses.

It is manifest that the statute denials of the answer can not take the place of a bill in equity on which to grant affirmative equitable relief, nor could the jury on the trial of a law issue give any such relief.

Some cases may be found where conveyances under State laws are declared void when made under certain circumstances, and where they have been permitted to be shown to be void in actions at law. These cases depend on State statutes, and are not like the one now under consideration; and in case of a United States patent it is not competent for any State or Territorial legislature to say what its effect shall be, or to avoid it otherwise than in accordance with the settled rules of jurisprudence.

Although not within the assignments of error, it was argued that the evidence showed the patents lying below the No You Don't void, because the respondents alleged there was but one vein. The evidence tended to show that the strike or outcrop of the vein ran northeasterly and southwesterly, and that the No You Don't is laid on the general course of the vein.

It seems to be conceded, and this objection is based on the assumption that the Nez Perces Chief and the Third Westerly Extension of the Telegraph occupy different sections on the dip of the vein, if there is but one. If, as respondents claim, there is but one vein, then it is claimed by the appellant there were no mineral discoveries upon the locations of the two claims last named, and no veins which could be patented with the surface, and that as the respondent, Holden,

testified he knew, at the time these patents were applied for, that all were on the same vein, the patents are void. The appellant, as has already been shown, is not in a position in this action to avoid these patents for these reasons.

It can not be doubted but that the patents passed whatever title the government had to the surface, and any vein or veins beneath it not otherwise granted. As to the surface, it is a matter between the government and the respondents; the appellant has no standing in that respect.

It will be seen by a reference to the maps in evidence, that each of these patents cover different lengths on the vein, not within the protracted end lines of any other patent, so that each does cover a port on of the vein not embraced in other patents.

As to a mineral discovery, the law requires that the land located must belong to the United States, and that no claim shall be located until the discovery of the vein within its limits. The patents presume a compliance with the mining laws, and there is no proof that a lode was not discovered within the limits of each claim. The maps show extensive workings beneath each. The law was complied with if a lode was discovered, and the locations were not void because by subsequent developments it might prove to be on the dip of a section of the lode previously located. The question would then arise between the claimants, and the older claimant might or might not insist on following his lode as he chose. At all events, before he did so, and before the second locator was ousted from the possession, the later claim would be patentable as mineral land containing a lode.

The government holds its mineral lands for sale, and its officers are not restricted from granting such of them as contain a mineral lode because at some future time one locator may trace out another. These are questions concerning which the government does not inquire. It is enough that there is a lode in the ground in possession of the claimant, who in respect thereto has complied with the mining laws. Neither can it make any difference that the several claims have come to the possession of one party.

The eighth assignment of error is on the instructions given for the respondents from number two to twenty inclusive.

The second instruction is objected to on the assumption that it overlooks rights which may be acquired by bare possession and without other right. The instruction, in terms, seems to admit such rights may exist.

The third instruction is substantially in the words of the law, and if the appellant desired a fuller explanation he should have asked it. The appellant, while setting out in his complaint the location of the Montreal, nowhere alleged that it was marked on the ground, or that it was located in accordance with the requirements of the act of Congress; nor did the answer of the respondents admit the regularity of the location.

Appellant, in his brief, refers to the answer to the cause of action for an accounting, which was not before the court as a pleading in connection with the trial of the count for ejectment, nor put in evidence as an admission.

The objections to the instructions from four to fourteen, inclusive, and those numbered eighteen and nineteen, are disposed of by what has been previously said, and require no further explanation, except as to the effect of the Nez Perces Chief patent. That patent is founded on a location junior to the location of the Montreal, and the court on the trial gave the same conclusive effect to this as to patents founded on older locations. In accordance with the views previously stated that patent granted a perfect title in this action to whatever was the subject of the grant, at least from its date, and hence was a defense, if it carried the Montreal vein, to the extent provided by C. L., § 1481. But as the respondents proved the date of location, conveyance of the possessory title down to them, the date of entry, and that the patent was founded on that location, it was given effect by relation to a time anterior to the commencement of the action.

This legal effect is a part of the patent title and overreached the appellant's action, and the date of the acquisition of his title.

The fifteenth, sixteenth, and seventeenth instructions relate to Montreal surface ground, outside of any of respondents' patents, concerning which nothing has been heretofore said. The respondents denied the alleged ouster, but it was proved that they occupied portions of the area, bounded by the side lines,

from four to five hundred feet in length. From the evidence it would seem this portion is near the works of the mine, and whether any or what portion of this length is within the Roman Empire patent does not appear, and it must be assumed the respondents took possession of some part of the surface outside of the lines of that patented claim. It is not claimed the respondents had any title or right of possession to this surface. The instructions given are based on the contingency that the jury should find the respondents owned the Montreal vein; and as a locator has no right to the possession of mineral land except as the possessor of a vein in it, that the appellant had no title or right of possession to the surface. It is argued that if appellant had no title or right of possession, but had the actual possession, he could not be ousted by one also without right. This is unquestioned and is clearly implied in the instructions. The question was whether the appellant had possession. If he was without right of possession, he must have had such a possession as would enable him to maintain trespass. This was the question submitted to the jury, and it becomes necessary to look to the evidence to see whether the case was so clear for the appellant that such submission was error.

The appellant testifies that he and his co-owners, Berassa and Duronzo, worked the mine, dividing profits, until February, 1876. The two co-owners then sold out to Morris, and he to Wadsworth, Myers and others, who went into possession and worked the mine, but never accounted to the appellant, and he adds, "after Berassa and Duronzo sold out I was not in the actual possession of it; I was out when they (Wadsworth and others) took possession of it, and never been in possession since; that was in February, 1876."

The testimony of John W. Kerr, one of the purchasers of the two-thirds interest in February, 1876, is in substance, that while they worked the mine, the appellant was never in possession or had anything to do with it, and his right to an accounting was denied. He also gives the names of the parties interested on page 107 of the record, where the name of "King" is evidently misprinted "Kahn."

The testimony of this witness, and also the testimony of the respondent, Holden, show how the respondents acquired pos-

session of the Montreal vein, and so much of the surface as they occupied. After claiming they had traced out the Montreal from the No You Don't down, they commenced an action against those working the Montreal and obtained a preliminary restraining order. A settlement was then made by which the respondents purchased of the possessors of the Montreal other mining property and the possession of the Montreal.

The witness Holden, in regard to this says, he "purchased this piece," and that the main object was to get possession of the property and continue to work without interruption. The occupants turned over the possession to the respondents.

In this state of the evidence there was no error, at least as against the appellant, in submitting to the jury the question of the possession of the appellant at the time the respondents entered. Assuming the contingencies submitted, that the appellant was without right, it does not seem he had such a possession as would enable him to maintain trespass.

The appellant also objected to, and assigns error on, the twentieth instruction. Under the evidence there seems to be no error in this.

The alleged error is based on the assumption that the respondents having purchased two-thirds of the Montreal, became tenants in common with appellant, and are estopped from denying that title. The respondents do not, in the action, set up that title, or claim under it. It is a fair inference from the evidence that they did not enter under that, but under the claim of an adverse title; at least the evidence on this point was sufficient to submit the question to the jury, and the fact that the respondents paid the owners of the two-thirds interest something, pending litigation, to get out of the way and yield the possession, can not bind them to any allegiance to that title. In so far as the instruction relates to a mining partnership, it is fully supported by the evidence, or rather want of evidence, of such a relation.

As most of the instructions asked by the appellant are the converse of those given on the part of the respondents, it will not be necessary to notice them in detail.

The third instruction asked was erroneous because it declared it was sufficient if the notice of location described the claim. The law provides, not only for a description in the

notice, but also that it shall be marked on the ground. The instructions numbered from the fourth to the tenth inclusive were properly refused. They seem to be based on the idea that the respondents entered under the Montreal title and then bought in the adverse title. There is no evidence of this kind.

From the verdict of the jury it is evident that the question of what is or is not a mining partnership could have nothing to do with the case, and did not enter into their consideration of it.

The eleventh and twelfth instructions asked by the appellant have been passed upon in considering other propositions.

The thirteenth instruction recites that the appellant claims one third of the surface and vein of the Montreal; therefore, if the respondents own the vein, he is entitled to surface.

It will be seen this asks the court to direct a verdict for surface ground, and wholly ignores the question of the sufficiency of his possession to maintain the action irrespective of right, and even assuming the jury find he is without right.

The instructions given at the request of the parties and by the court, fairly submitted the questions raised, and the judgment should be affirmed with costs.

SCHAEFFER, C. J., concurred; BOREMAN, J., dissented.

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[1]McGARRAHAN v. NEW IDRIA MINING CO.

(96 United States, 316. Supreme Court, 1877.)

Public records as evidence. The record in the general land office of a patent from the United States is evidence of a grant, but is not the grant itself. If the instrument as recorded is sufficient on its face to pass the title, it is to be presumed that the grant has actually been made; but if it is not sufficient, no such presumption arises. The public records of the executive departments of the government are not, like those kept pursuant to ordinary registration laws, intended for notice, but for preservation of the evidence of the transactions of the department.

Record of patent not countersigned not evidence. A patent from the United States for lands must be signed in the name of the president, either

[1]S. C. below, 11 M. R. 641.

by himself or by his duly appointed secretary, sealed with the seal of the general land office, and countersigned by the recorder. Until all these things are done, the United States has not executed a patent for a grant of lands. A record which fails to show that the patent was countersigned by the recorder, is not sufficient to prove a grant from the United States.

Exemplifications of records as evidence. The countersigning of the patent is not dispensed with by the act of March, 1843, which provides for exemplifications of records to be used as evidence. Under this act the names need not be fully inserted in the record; if they are partially inserted in the record it will be presumed that they fully appear in the patent; but no such presumption will be raised if no signature is shown by the record.

Failure to record does not defeat patent. The failure to record a patent does not defeat the grant. If the patentee can produce the patent itself, and that is executed with all the formalities required by the law, he can still maintain his rights under it.

Error to the Supreme Court of the State of California.

This was ejectment by William McGarrahan in the District Court of the Twentieth Judicial District of California in and for Santa Clara County, against the New Idria Mining Company, to recover possession of certain lands in that State known as the Rancho Panoche Grande. He claimed them under a pa ent therefor which he alleged had been issued by the United States to Vincente P. Gomez, his grantor, under the act of Congress to ascertain and settle the private land claims in the State of California, approved March 3, 1851, 9 Stat. 631. The patent was not produced upon the trial, but the plaintiff put in evidence a certified copy of an instrument, as the same was recorded in a volume kept at the general land office at Washington for the recording of patents of the United States for confirmed Mexican land grants in California, being volume 4 of such records, upon pages 312–321 inclusive. The concluding portion of that copy is as follows:

"In testimony whereof, I, Abraham Lincoln, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

"Given under my hand at the city of Washington, this fourteenth day of March, in the year of our Lord one thou-

sand eight hundred and sixty-three, and of the Independence of the United States the eighty-seventh.

[L. S.] "By the President: ABRAHAM LINCOLN.

"By W. O. STODDARD,

"Secretary.

"Acting Recorder of the General Land Office."

As the only question decided by this court is, whether the exemplification admitted on the trial of the cause shows upon its face the execution of a patent sufficient in law to pass the title of the United States, no reference is made to the other points which arose in the court below and were elaborately discussed by counsel here.

The district court rendered judgment for the defendant, which was affirmed by the Supreme Court. McGarrahan then sued out this writ of error.

MONTGOMERY BLAIR, MATT. H. CARPENTER, and CHARLES P. SHAW, for the plaintiff in error.

JEREMIAH S. BLACK, *contra.*

Mr. Chief Justice WAITE delivered the opinion of the court.

The federal question in this case, is, whether the record in the volume kept at the general land office, at Washington, for the recording of patents of the United States issued upon California confirmed Mexican grants, relied upon by McGarrahan as evidence of his title, proves a conveyance by the United States of the land in controversy to Vincente P. Gomez, his grantor. In his behalf it is contended that the record is itself the grant; or, if not, that it proves the issue to Gomez of a patent which does grant the legal title to the property described.

That the record is not itself the grant of title is evident. The thirteenth section of the act "to ascertain and settle the private land claims in the State of California" (9 Stat. 631), provides, that "for all claims finally confirmed * * a patent shall issue to the claimant upon his presenting to the general land office an authentic copy of such confirmation and a plat of the survey," etc. By Sec. 8 of the "act for the

establishment of a general land office in the department of the treasu y" (2 Id. 717), it is enacted, that "all patents issuing from the said office shall be issued in the name of the United States, and under the seal of said office, and be signed by the president of the United States, and countersigned by the commissioner of said office, and shall be recorded in said office in books to be kept for the purpose." Thus the patent executed n the prescribed form which issues from the general land office, is made the instrument of passing title out of the United States. The record of this patent is evidence of the grant, but not the grant itself. It is evidence of equal dignity with the patent, because, like the patent, it shows that a patent containing the grant has been issued.

The record called for by the act of Congress is made by copying the patent to be issued into the book kept for that purpose. The effect of the record, therefore, is to show that an instrument such as is there copied has actually been prepared for issue from the general land office. If the instrument, as recorded, is sufficient on its face to pass the title, it is to be presumed that the grant has actually been made; but, if it is not sufficient, no such presumption arises. In short, the record, for the purposes of evidence, stands in the same position and has the same effect as the instrument of which it purports to be a copy. The same defenses can be made against the record as could be made against the instrument recorded. The public records of the executive departments of the government are not, like those kept pursuant to ordinary registration laws, intended for notice, but for preservation of the evidence of the transactions of the department.

This brings us to inquire whether this record shows upon its face the execution of a patent sufficient in law to transfer the title of the premises in controversy from the United States. And here it may not be improper to note, that although the case shows that in July, 1870, before this suit was commenced, the commissioner of the general land office and the recorder caused to be entered upon the face of the record, over their official signatures, a statement to the effect that the instrument in question was never in fact executed or delivered, McGarrahan rests his whole case upon the record and the evidence it furnishes. This he has the undoubted right to do; but, if he does, he must stand or fall by what it proves. It is

his own fault, if, having a valid patent in his possession, he fails to produce it.

By the first section of the "Act to re-organize the general land office" (5 Stat. 107), it was provided that the executive duties relating "to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the commissioner of the general land office under the direction of the President of the United States;" and by the fourth section, "that there shall be appointed by the President, by and with the consent of the Senate, a recorder of the general land office, whose duty it shall be, in pursuance of instructions from the commissioner, to certify and affix the seal of the general land office to all patents for public lands, and he shall attend to the correct engrossing and recording and transmission of such patents. He shall prepare alphabetical indexes of the names of patentees, and of persons entitled to patents * *" By the sixth section, it was further provided that "it shall be lawful for the President of the United States, by and with the advice and consent of the Senate, to appoint a secretary, * * whose duty it shall be, under the direction of the President, to sign, in his name and for him, all patents for lands sold or granted under the authority of the United States." By the second section of the act of March 3, 1841 (Id. 416), the duty of countersigning patents was transferred from the commissioner of the general land office to the recorder. Thus it appears that a patent for lands must be signed in the name of the President, either by himself or by his duly appointed secretary, sealed with the seal of the general land office, and countersigned by the recorder. Until all these things have been done, the United States has not executed a patent for a grant of lands. Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one can not be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires. Not what other statutes may pres ribe, but what this does. Neither the signing nor the sealing nor the countersigning can be omitted, any more than the signing or

the sealing or the acknowledgment by a grantor, or the attestation by witnesses, when by statute such forms are prescribed, for the due execution of deeds by private parties for the conveyance of lands. It has never been doubted that in such cases the omission of any of the statutory requirements invalidates the deed. The legal title to lands can not be conveyed, except in the form provided by law.

But if either of the requisites to the due execution of a patent may be considered as directory, the countersigning by the recorder should not be permitted to occupy that position. The president may sign by his secretary, but the recorder must sign himself. He countersigns, that is to say, signs opposite to and after the president, by way of authentication. Being specially charged with the duty of attending to the issue of patents, it is peculiarly appropriate that his attestation should be the last act to be performed in the perfection of the instrument, and that he should do it personally.

The record in this case shows an instrument in the form of a patent, signed in the name of the president, and sealed. The place for the signature of the acting recorder is left blank. The name of the president is signed by his secretary. The claim which is made, that Stoddard, the secretary, also countersigned as acting recorder, is not sustained by the evidence. His signature appears only as secretary, and there is nothing whatever to indicate that he attempted to act as recorder. Besides, the law provides (5 Stat. 111, Sec. 8), "that whenever the office of recorder shall become vacant, or in case of the sickness or absence of the recorder, the duties of his office shall be performed *ad interim* by the principal clerk on private land claims." It certainly is not to be presumed that the same person will hold at the same time the offices of secretary to the president for signing patents, and of principal clerk on private land claims. And if it were, his signature as secretary will not be treated as his signature as recorder *ad interim* or acting recorder. He must sign both as secretary and as recorder.

The case is, therefore, one in which the record shows upon its face an instrument prepared for a patent but not countersigned by the recorder. If a patent thus defectively executed had itself been introduced in evidence, it would not have shown a grant actually perfected. But it is said that the

record of the paper is evidence of the fact that the recorder recognized its completeness and is equivalent to its countersignature. The law is not satisfied with the simple recognition of the validity of a patent by an officer of the government. To be valid, a patent must be actually executed. Before it can operate as a grant the last formalities of the law prescribed for its execution must be complied with. No provision is made for an equivalent of these formalities. Even an actual delivery of the patent by the recorder in person would not supply the place of his countersignature, any more than the delivery of a paper by a private person without being signed would make it his deed. But the record of a patent would not be necessarily as much a recognition of its validity as a personal delivery by the recorder, because he only attends to the recording, and is not required to do it in person. The only way in which he can lawfully and effectually recognize the validity of a patent is by personally countersigning it.

Again, it is said that the act of March 3, 1843, (5 Stat. 627) remedies the defect, because it provides "that literal exemplifications of any such records which may have been or may be granted in virtue of the provisions of the seventh section of the act, * * * entitled 'An Act to Re-organize the General Land Office,' shall be deemed and held to be of the same validity in all proceedings, whether at law or in equity, wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted in such record." This act does not, however, dispense with the signing and countersigning. The record to prove a valid patent must still show that these provisions of the law were complied with. The names need not be fully inserted in the record, but it must appear in some form that the names were actually signed to the patent when it issued. If they are partially inserted in the record, it will be presumed that they fully appeared in the patent; but no such presumption will be raised if no signature is shown by the record. Here no signature does appear, and consequently none will be presumed.

The failure to record the patent does not defeat the grant. It only takes from the party one of the means of making his proof. If he can produce the patent itself, and that is exe-

cuted with all the formalities required by the law, he can still maintain his rights under it. He is not, therefore, necessarily deprived of his title because of a defective record. He is in no worse condition with the signatures omitted than he would have been if the description of his land had been erroneously copied, or other mistakes had been made which rendered the record useless for the purpose of evidence. A perfect record of a perfect patent proves the grant; but a perfect record of an imperfect patent, or an imperfect record of a perfect patent has no such effect. In such a case, if a perfect patent has in fact issued, it must be proved in some other way than by the record. It is undoubtedly true, that, when a right to a patent is complete, and the last formalities of the law in respect to its execution and issue have been complied with by the officers of the government charged with that duty, the record will be treated as presumptive evidence of its delivery to and acceptance, by the grantee. But until the patent is complete, it can not properly be recorded, and consequently an incomplete record raises no such presumption.

Again, it is said that the record of an instrument which the law requires to be recorded is *prima facie* evidence of the validity of the instrument. That is undoubtedly true, if the instrument recorded is apparently valid. The presumption arising from the record is, that whatever appears to have been done, actually was done. If the record shows a perfect instrument, the presumption is in favor of its validity; but if it shows an imperfect instrument, a corresponding presumption follows. Here the instrument recorded appears to have been incomplete, and consequently it must be presumed to be invalid. This presumption will continue until overcome by proof that the instrument as executed and delivered was valid.

We are of the opinion that because this record does not show a patent countersigned by the recorder, it is not sufficient to prove title in the party under whom McGarrahan claims. This makes it unnecessary to consider any of the other questions which have been argued; and the judgment is

Affirmed.

Mr. Justice FIELD and Mr. Justice HARLAN took no part in the decision of this cause.

ST. LOUIS SMELTING AND REFINING CO. v. KEMP.

(104 United States, 636. Supreme Court, 1881.)

Patent not to be attacked in court of law. A patent from the United States for land, is conclusive in a court of law as to all matters properly determinable by the land department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. If, however, it has no such jurisdiction, the patent may be collaterally impeached, and its operation as a conveyance defeated upon that ground.

[1] **Remedy in equity for wrongful issuance.** If in issuing a patent the officers of the land department take mistaken views of the law, or draw erroneous conclusions from the evidence, or act from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even then must possess such equities as will control the legal title in the patentee's hands.

A stranger to the title can not complain of the action of the government with respect to such title.

Placer patent for over 160 acres upheld—Impeachment by showing irregularities in land office not allowed. The St. L. Co. brought ejectment against K., and claimed title by virtue of a placer patent from the United States of date March 29, 1879, and embracing 164.60 acres. The defendant had judgment and upon review it was *held*, that there was error: 1. In admitting the record of the proceedings of the land office to impeach the validity of the patent; 2. In instructing the jury that a patent for a placer claim, since the act of 1870, could not embrace in any case more than 160 acres; 3. In instructing the jury that the owner, by purchase of several claims, must take separate proceedings upon each one in order to obtain a valid patent, and that it was not lawful for him to prosecute a single application upon a consolidation of several claims into one, or for the land officers to allow such application and to issue a patent thereon.

[2] **Placer may exceed 160 acres and cover several locations.** A patent issued subsequently to the passage of said act of 1870, may embrace a placer mining claim of more than 160 acres, and including as many adjoining locations as the patentee had purchased. The proceedings to obtain a patent, therefore, are the same as when the claim covers but one location.

"Location" and "Mining Claim" distinguished. A mining claim may embrace one or more locations.

Improvements on group of locations constituting one claim. Improvements on one of a group of locations, constituting a consolidated claim,

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[1] *Kahn* v. *Old Telegraph Co.*, 11 M. R. 646.

[2] Re-affirmed: *Tucker* v. *Masser*, 113 U. S. 203.

or work done at a distance from the claim, as in the case of operations to lead water to, or carry tailings from the claim, apply as labor under the mining acts.

Error to the Circuit Court of the United States for the District of Colorado.

This was an action at law brought in one of the courts of Colorado by the St. Louis Smelting and Refining Company, a corporation created under the laws of Missouri, for the possession of a parcel of land in the city of Leadville. On application of the defendants it was removed to the Circuit Court of the United States. The complaint is in the usual form of action for the possession of real property under the practice obtaining in Colorado. It alleges that the plaintiff was duly incorporated with power to purchase and hold real estate; that it was the owner in fee and entitled to the possession of the premises mentioned, describing them, and that the defendants wrongfully withheld them, to the damage of the plaintiff of $5,000.

The defendants filed an answer admitting that the plaintiff was incorporated as averred, but denying that it was the owner in fee of the demanded premises, or that they were wrongfully detained from its possession, or that it had sustained any damage. The answer also alleged that the plaintiff, as a foreign corporation, was incompetent to acquire title to any real estate in Colorado, except such as might be necessary for the transaction of its business as a smelting and refining company, and that the premises in controversy were not necessary for that purpose, but were acquired for speculation.

The plaintiff filed a replication denying its incompetency to hold real estate as alleged, and averring that it was authorized, under the laws of Missouri, to buy, sell and deal in real estate for any purpose whatever; that the property in controversy was acquired as a site for smelting and reduction works, and that such works were afterward erected upon it and used for reducing and smelting silver ores.

The case was tried in November, 1879. To maintain the issues on its part the plaintiff offered in evidence a patent of the United States to Thomas Starr, dated March 29, 1879, for

mining ground, which, it was admitted, included the premises in controversy. The patent recited that, pursuant to provisions of chapter six of title thirty-two of the Revised Statutes, there had been deposited in the general land office the plat and field notes of the placer mining claim of Thomas Starr, the patentee, accompanied by a certificate of the register of the land office at Fairplay, Colorado, within which district the premises are situated; that Starr had, on the 6th of March, 1879, entered an application for the said claim, which contained one hundred and sixty four acres of land and sixty one hundredths of an acre, more or less. The patent also specified the boundaries of the tract according to the field notes, and contained the recitals and words of grant and transfer usually inserted in patents for placer mining land. To the introduction of this patent the defendants objected, but the record does not state on what grounds the objection was founded, and it was overruled. The patent was, accordingly, admitted in evidence. The plaintiff traced title to the land by sundry mesne conveyances from the patentee. It also introduced the certificate of the register of the same land office, showing that the application of Starr at that office, to enter and pay for his claim, was made on the 18th of March, 1878; also a copy of the articles of incorporation of the plaintiff, and of the laws of Missouri under which the incorporation was had, and proved that, in 1877, prior to the existence of the town of Leadville, the company purchased of the claimant the tract embraced in the patent, for the purpose of erecting reduction works thereon, and that at the time of the purchase and when it commenced the construction of the works the land was unoccupied by other parties.

The plaintiff having rested its case, the defendants offered in evidence a certified copy of the record of proceedings in the general land office at Washington, upon which Starr obtained his patent, to the introduction of which the plaintiff objected, on the ground that it could only show, or tend to show, the regularity or irregularity of the proceedings before the executive department in obtaining the patent, or the validity or invalidity of the possessory title or pre-emption right, upon which the patent was founded, and that no evidence could be introduced to impeach the patent or attack it collat-

erally, or in any way affect it in this action. But the court overruled the objection and admitted the record. To this ruling an exception was taken.

The case being closed, the court instructed the jury substantially as follows: That a patent for a mining claim, since the passage of the act of Congress of 1870, could not embrace more than one hundred and sixty acres; that individuals and associations were, by that act, put upon the same footing, and that either might take that amount, but that by the mining act of Congress of 1872 an individual claimant was limited to twenty acres, whilst an association of persons could still take one hundred and sixty, as before; that the proceedings in the land office were allowed in evidence, in order to show whether the patent was issued upon locations made prior to 1870, and that they showed that the claim of Starr was based upon twelve or fifteen locations, some of which were prior to 1870, and some since then; and added, that "if Mr. Starr was the owner of these claims, if he had obtained them by purchase, and they were valid and regular locations, he would, under the act, be required, if he desired to obtain a patent for them, to make application for each one of them, to post the notice, as required by the statute, and give the publication, and file his plat and survey, and do all these things which are required in the several claims, upon each one of them. If he had done so, and his right had been supported as to all of them, and the patent had been issued for all of these claims, and each of them described in the patent, there would have been no objection to the patent; but it was not competent for him to consolidate these claims and put them all in as one claim, and upon notice given as one claim, and publication as one claim, and proceeding throughout as one claim embracing one hundred and sixty-four acres;" and that the officers of the land department had no authority in law to proceed in that way, and therefore the patent upon which the plaintiff relied was void and its title failed.

To the instructions given exceptions were taken. The jury thereupon found for the defendants, and judgment in their favor was accordingly entered. To review this judgment the plaintiff removed the case here by writ of error.

Mr. J. H. McGOWAN and Mr. WALTER H. SMITH, for plaintiffs in error.

Mr. FLETCHER P. CUPPY and Mr. THOMAS A. GREEN, for defendants in error.

Mr. ALLEN G. THURMAN, on behalf of certain interested parties, was heard by the court, in opposition to the judgment below.

Mr. JUSTICE FIELD, after stating the case, delivered the opinion of the court, as follows:

As seen by the statement of the case, the plaintiff relies for a reversal of the judgment upon three grounds: 1st, error in admitting the record of the proceedings of the land office to impeach the validity of the patent to Starr issued upon them; 2d, error in instructing the jury that a patent for a placer claim, since the act of 1870, could not embrace in any case more than one hundred and sixty acres; and, 3d, error in instructing the jury that the owner, by purchase of several claims, must take separate proceedings upon each one, in order to obtain a valid patent, and that it was not lawful for him to prosecute a single application upon a consolidation of several claims into one, or for the land officers, to allow such application and to issue a patent thereon.

We are of opinion that these several grounds are well taken, and that in each particular mentioned the court below erred.

The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title, the law has made numerous provisions designating the persons who may acquire it, and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented

for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the land department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence: *Moore* v. *Wilkinson*, 13 Cal. 478; *Beard* v. *Federy*, 3 Wall. 478, 492.

Of course when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and exc-

cute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.

These views are not new in this court; they have been either in express terms or in substance, affirmed in repeated instances. One of the earliest cases on the subject was that of *Polk's Lessee* v. *Wendal*, reported in 9th Cranch, where the doctrine we have stated was declared, and the exceptions to it mentioned. There the plaintiff brought an action upon a patent of North Carolina, issued in 1800, for five thousand acres. The defendants relied upon a prior patent of the State for twenty-five thousand acres, issued in 1795 to one Sevier, through whom they claimed. Each patent embraced the lands in controversy, and they were situated in that portion of Tennessee ceded to the United States by North Carolina. On the trial it was contended that the elder patent was void on its face because it covered more than five thousand acres, the limit prescribed for a single entry by the laws of that State. Proof was also offered that the lands had not been entered in the office of the entry-taker of the proper county before their cession to the United States, and it was contended that the patent was therefore invalid. We shall hereafter refer to what the court said as to the alleged excess of quantity in the patent. At present we shall only notice the general doctrine declared as to the unassailability of patents in a court of law, and its decision upon the admissibility of the proof offered. It seems that a statute of 1777 directed the appointment in each county of an officer called an entry-taker, who was

required to receive entries of all vacant lands in his county, and, if the lands thus entered were not within three months claimed by some other party than the person entering them, to deliver to such person a copy of the entry, with its proper number, and an order to the county surveyor to survey the land. This order was called a warrant. Upon it and the survey which followed a patent was issued. If there were no entry, there could be no warrant, and of course no valid patent. The ninth section declared that every right claimed by any person to lands which were not acquired in this mode, or by purchase or inheritance from parties who did so acquire them, or which were obtained in fraud or evasion of the provisions of the act, should be declared void. In 1779 North Carolina ceded to the United States the territory in which the lands lie for which the patent to Sevier was issued, reserving, however, to the State, all existing rights, which were to be perfected according to its laws. The cession was accepted by Congress. The survey, upon which the patent to Sevier was issued, was made in 1795, and the plaintiff, to impeach the patent, offered, as already stated, to show that there had been no entry of the land in the office of the entry-taker of the county where it was situated, previous to the cession; that is, in substance, that the grantor had no authority to make the grant, the land having been previously conveyed to the United States. This offer was disallowed by the court below, and as judgment passed for the defendants, the case was brought to this court, where, as mentioned, the general doctrine as to the presumptions attending a patent, which we have stated, was declared, with the exceptions to it. Upon the general doctrines the court observed, speaking through Mr. Chief Justice Marshall, that the laws for the sale of the public lands provided many guards to secure the regularity of grants and to protect the incipient rights of individuals and of the State from imposition; that officers were appointed to superintend the business, and rules had been framed prescribing their duty; that these rules were in general directory, and when all the proceedings were completed by a patent issued by the authority of the State, a compliance with those rules was presupposed, and that "every prerequisite has been performed is an inference properly deducible, and which every

man has a right to draw from the existence of the grant itself." "It would, therefore, be extremely unreasonable," said the court, "to avoid the grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of the title from its commencement to its consummation in a patent;" but there were some things so essential to the validity of a contract, that the great principles of justice and of law would be violated did there not exist some tribunal to which an injured party might appeal, and in which the means by which the elder title was acquired might be examined, and that a court of equity was a tribunal better adapted to this object than a court of law; and it added that "there are cases in which a grant is absolutely void; as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." So the court held that proof that no entry had been made in the office of the entry-taker in the county where the lands patented were situated, prior to the cession to the United States, was admissible under the ninth section; for without such entry they would not be within the reservation mentioned in the act of cession. In other words, proof was admissible to show that the State had not retained control over the property, but had conveyed it to the United States.

In *Patterson* v. *Winn*, reported in 11th Wheaton, this case is cited, and after stating what it decided, the court said: "We may, therefore, assume as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the State had no title, it could be impeached collaterally in a court of law in an action of ejectment, *but in general other objections and defects complained of must be put in issue in a regular course of pleading in a direct proceeding to avoid the patent.*"

The doctrine declared in these cases as to the presumptions attending a patent has been uniformly followed by this court. The exceptions mentioned have also been regarded as sound, although from the general language used some of them may require explanation to understand fully their import. If the

patent, according to the doctrine, be absolutely void on its face it may be collaterally impeached in a court of law. It is seldom, however, that the recitals of a patent will nullify its granting clause, as, for instance, that the land which it purports to convey is reserved from sale. Of course, should such inconsistency appear, the grant would fail. Something more, however, than an apparent contradiction in its terms is meant when we speak of a patent being void on its face. It is meant that the patent is seen to be invalid, either when read in the light of existing law, or by reason of what the court must take judicial notice of; as, for instance, that the land is reserved by statute from sale, or otherwise appropriated, or that the patent is for an authorized amount, or is executed by officers who are not intrusted by law with the power to issue grants of portions of the public domain.

So, also, according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualification, that when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision. With these explanations of the exceptions, the doctrine of the cases cited may be taken as expressing the law accepted by this court since they were decided: *Hoofnagle* v. *Anderson*, 7 Wheat. 212; *Boardman* v. *Lessees of Reed*, 6 Pet. 328; *Bagnell* v. *Broderick*, 13 Id. 436; *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530.

In *Johnson* v. *Towsley* the court had occasion to consider under what circumstances the action of the land department in issuing patents was final, and after observing that it had found no support for the proposition offered in that case by counsel upon certain provisions of a statute, said, speaking by Mr. Justice Miller, that the argument for the finalty of such action was "much stronger when founded on the general doctrine that when the law has confided to a special tribunal

the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others." "That the action of the land office," the court added, "in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted on the principle above stated, and in all courts and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted under the circumstances under which it was obtained;" and then observed, that there exists in the courts of equity the power to correct mistakes and relieve against frauds and impositions; and that in cases where it was clear that the officers of the land department had, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give proper relief. The doctrine thus stated was approved in the subsequent case of *Moore* v. *Robbins*.

The general doctrine declared may be stated in a different form, thus: A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if, in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed. Thus, in *Minter* v. *Crommelin*, reported in 18th Howard, where it appeared that an act of Congress of 1815 had provided that no land reserved to a Creek warrior should be offered for sale by an officer of the land department unless specifically directed by the secretary of the treasury, and declared that if the Indian abandoned the reserved land it should become forfeited to the United States, a patent was issued for the land, which did not show that the secretary had ordered it to be sold, and the court said: "The rule being that the patent is evidence that all previous steps had been regularly taken to justify making of the patent, and

one of the necessary steps here being an order from the secretary to the register to offer the land for sale because the warrior had abandoned it, we are bound to presume that the order was given. That such is the effect, as evidence of the patent produced by the plaintiffs, was adjudged in the case of *Bagnell* v. *Broderick*, 13 Pet. 436, and is not open to controversy anywhere, and the State court was mistaken in holding otherwise."

On the other hand a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question, but its authority to act at all is denied and shown never to have existed.

According to the doctrine thus expressed and the cases cited in its support—and there are none in conflict with it—there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint can not be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands: *Boggs* v. *Merced Mining Co.*, 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation.

This doctrine as to the conclusiveness of a patent is not inconsistent with the right of the patentee, often recognized by this court, to show the date of the original proceeding for the acquisition of the title, where it is not stated in the instrument, as the patent is deemed to take effect by relation as of that date, so far as it is necessary to cut off intervening adverse claims. Thus, in a contest between two patentees for the same land, it may be shown that a junior patent was founded upon an earlier entry than an older patent, and, therefore, passes the title. Such evidence in no way trenches upon the ruling of the department upon matters pending before it. Nor is the doctrine of the conclusiveness of the patent inconsistent with the right of a party resisting it to show, if an entry is not stated in the instrument, that no entry of the land was made as an initiatory proceeding, where a statute, as was the case in North Carolina, mentioned in *Polk's Lessee* v. *Wendal*, declares that proceedings for the title, when such entry has not been made, shall be adjudged invalid. A statute may in any case require proof of a fact which otherwise would be presumed. Except with reference to such anterior matters and others of like character, no one in a court of law can go behind the patent and call in question the validity of the proceedings upon which it is founded.

The case at bar, then, is reduced to the question whether the patent to Starr is void on its face; that is, whether, read in the light of existing law, it is seen to be invalid. It does not come within any of the exceptions mentioned in the cases cited. The lands it purports to convey are mineral, and were a part of the public domain. The law of Congress had provided for their sale. The proper officers of the land department supervised the proceedings. It bears the signature of the President, or rather of the officer authorized by law to place the President's signature to it, which is the same thing; it is properly countersigned, and the seal of the general land office is attached to it. It is regular on its face, unless some limitation in the law, as to the extent of a mining claim which can be patented, has been disregarded. The case of the defendants rests on the correctness of their assertion that a patent can not issue for a mining claim which embraces over one hundred and sixty acres. Assuming that the words "*more*

or less," accompanying the statement of the acres contained in the claim, are to be disregarded, and that the patent is construed as for one hundred and sixty-four acres and a fraction of an acre, there is nothing in the acts of Congress which prohibits the issue of a patent for that amount. They are silent as to the extent of a mining claim. They speak of locations and limit the extent of mining ground which an individual or an association of individuals may embrace in one of them. There is nothing in the reason of the thing, or in the language of the acts, which prevents an individual from acquiring by purchase the ground located by others and adding it to his own. The difficulty with the court below, as seen in its charge, evidently arose from confounding "location" and "mining claim," as though the two terms always represent the same thing, whereas they often mean very different things. A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules. It usually consists in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel, according to the local customs, or, since the statute of 1872, according to the provisions of that act: Rev. Stat., Sect. 2324. The location, which is the act of taking the parcel of mineral land, in time became among the miners synonymous with the mining claim originally appropriated. So, now, if the miner has only the ground covered by one location, "his mining claim" and "location" are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires the adjoining location of his neighbor; that is, the ground which his neighbor has taken up, and adds it to his own, then his mining claim covers the ground embraced by both locations, and henceforth he will speak of it as his claim. Indeed, his claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes, or, in other words, will constitute his mining claim, and be so designated. Such is the general understanding of miners and the meaning they attach to the term.

Previously to the act of July 9, 1870, Congress imposed no limitation to the area which might be included in the location of a placer claim. This, as well as every other thing relating to the acquisition and continued possession of a mining claim, was determined by rules and regulations established by miners themselves. Soon after the discovery of gold in California, as is well known, there was an immense immigration of gold-seekers into that Territory. They spread over the mineral regions and probed the earth in all directions in pursuit of the precious metals. Wherever they went they framed rules prescribing the conditions upon which mining ground might be taken up, in other words mining claims be located, and their continued possession secured. Those rules were so framed as to give to all immigrants absolute equality of right and privilege. The extent of ground which each might locate, that is, appropriate to himself, was limited so that all might, in the homely and expressive language of the day, have an equal chance in the struggle for the wealth there buried in the earth. But a few months' experience in the precarious and toilsome pursuit drove great numbers of the miners to seek other means of livelihood and fortune, and they therefore disposed of their claims. They never doubted that their rights could be transferred so that the purchaser would hold the claims by an equally good title. Their transferable character was always recognized by the local courts, and the title of the grantee enforced. Many individuals thus became the possessors of claims covering ground taken up by different locations, and the amount which each person or an association of persons might acquire and hold was only limited by his or their means of purchase.

The rules and regulations originally established in California have in their general features been adopted throughout all the mining regions of the United States. They were so wisely framed and were so just and fair in their operation that they have not to any great extent been interfered with by legislation, either State or national. In the first mining statute, passed July 9, 1866, they received the recognition and sanction of Congress, as they had previously the legislative and judicial approval of the States and Territories in which mines of gold and silver were found. That act declared, and the declaration

was repeated in a subsequent statute, that the mineral lands of the public domain were free and open to occupation and exploration by all citizens of the United States, and by those who had declared their intention to become such, subject to such regulations as might be prescribed by law, and subject, also, "to the local customs or rules of miners of the several mining districts," so far as the same were not in conflict with the laws of the United States. It authorized the issue of patents for claims on veins or lodes of quartz or other "rock in place," bearing gold, silver, cinnabar or copper. Placer claims first became the subject of regulation by the mining act of July 9, 1870, C. 235 (16 Stat. 217), which provided that patents for them might be issued under like circumstances and conditions as for vein or lode claims, and that persons having contiguous claims of *any size* might make joint entry thereof. But it also provided that no location of a placer claim thereafter made should exceed one hundred and sixty acres for one person or an association of persons. The mining act of May 10, 1872, C. 152 (17 Id. 91), declared that a location of a placer claim subsequently made should not include more than twenty acres for each individual claimant. These are all the provisions touching the extent of locations of placer claims, and they are re-enacted in the Revised Statutes, Sects. 2330, 2331. A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary. In the mining statutes numerous provisions assume and recognize the suitable character of one's interest in a mining claim. Sect. 13 of the act of 1870 declares that where a person or association or *their grantors* have held and worked claims for a period equal to the time prescribed by the Statute of Limitations of the State or Territory where the same is situated, evidence of such possession and working shall be sufficient to establish the right to a patent. Sect. 5 of the act of 1872, rendering a mining claim subject to relocation where certain conditions of improvement or expenditure had not been made, has a proviso that the original locators, *their heirs, assigns,* or *legal representatives,* have not resumed

work upon the claim, after such failure and before such location." These provisions are of themselves conclusive that the locator's interest in a mining grant is salable and transferable, even were there any doubt on the subject, in the absence of express statutory prohibition. Those of the act of 1870 are also conclusive of the right of the purchaser of claims to a patent, for it is with reference to it, that the derivative right by purchase or assignment is mentioned: Rev. Stat., Sects. 2332, 2334.

In addition to all this, it is difficult to perceive what object would be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground taken up by different locations and subsequently purchased and held by one individual. He can hold as many locations as he can purchase, and rely upon his possessory title. He is protected thereunder as completely as if he held a patent for them subject to the condition of certain annual expenditures upon them in labor or improvements. If he wishes, however, to obtain a patent, he must, in addition to other things, pay the government a fee of five dollars an acre, a sum that would not be increased if a separate patent were issued for each location.

The decision of this court upon one point in the case of *Polk's Lessee* v. *Wendal*, already cited, is directly applicable here. The patent to the defendants in that case was for twenty-five thousand acres of land, and one of the objections taken was that it was void, because the statute of North Carolina limited an entry of one person to five thousand acres. But the statute declared that where two or more persons had entered, or should afterward enter, lands jointly, or where two or more persons agreed to have their entries surveyed jointly in one or more surveys, the surveyor should survey the same accordingly in one entire survey. It was contended that as the statute provided for entries made by two or more persons, it could not be extended to the case of distinct entries belonging to the same person. To this the court replied as follows: "For this distinction it is impossible to conceive a reason. No motive can be imagined for allowing two or more persons to unite their entries in one survey which does not apply with at least as much force for allowing a single person to unite his entries, *adjoining each other*, in

one survey. It appears to the court that the case comes completely within the spirit, and is not opposed by the letter of the law. The case provided for is 'where two or more persons agree to have their entries surveyed jointly,' etc. Now this does not prevent the subsequent assignment of the entries to one of the parties; and the assignment is itself the agreement of the assignor that the assignee may survey the entries jointly or severally at his election. The court is of opinion that, under a sound construction of this law, entries, which might be joined in one survey, if remaining the property of two or more persons, may be joined, though they become the property of a single person." The objection to the patent, by reason of its embracing over five thousand acres, was accordingly overruled.

By a provision of the mining act of 1870 still in force, two or more persons or association of persons, having contiguous claims *of any size*, are allowed to make a joint entry thereof: Rev. Stat., Sect. 2330. If one individual should acquire all such contiguous claims by purchase, no sound reason can be suggested why he should not be equally entitled to enter them all by one entry as when they were held by the original parties. To quote the language of the case cited: "No motive can be imagined for allowing two or more persons to unite their entries in one survey which does not apply with at least as much force for allowing a single person to unite his entries adjoining each other in one survey."

The last position of the court below, that the owner of contiguous locations who seeks a patent must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed, is as untenable as the rulings already considered. The object in allowing patents is to vest the fee in the miner, and thus encourage the construction of permanent works for the development of the mineral resources of the country. Requiring a separate application for each location, with a separate survey and notice, where several adjoining each other are held by the same individual, would confer no benefit beyond that accruing to the land officers from an increase of their fees. The public would derive no advantage from it, and the owner would be subjected to onerous and often ruinous burdens. The services of an attorney are usually retained when a patent is

sought, and the expenses attendant upon the proceeding are, in many instances very great. To lessen these as much as possible the practice has been common for miners to consolidate, by conveyance to a single person or an association or company, many contiguous claims into one, for which only one application is made and of which only one survey is had. Long before patents were allowed—indeed, from the earliest period in which mining for gold and silver was pursued as a business—miners were in the habit of consolidating adjoining claims, whether they consisted of one or more original locations, into one, for convenience and economy in working them. It was therefore very natural, when patents were allowed, that the practice of presenting a single application with one survey of the whole tract should prevail. It was at the outset, and has ever since been approved by the department, and its propriety has never before been questioned. Patents, we are informed, for mining ground of the value of many millions of dollars, have been issued upon consolidated claims, nearly all of which would be invalidated if the positions assumed by the defendants could be sustained.

It was urged on the argument that a patent for each location was required to prevent a monopoly of mining ground—to prevent, to use the language of counsel, the public domain from being "monopolized by speculators." The law limiting the extent of mining lands which an individual may locate has provided, so far as it was deemed wise, against an accumulation of them in one person's hands. It could not have prohibited the sale of the location of an individual without imposing a restriction injurious to his interests, and in many instances destructive of the whole value of his claim. Every one at all familiar with our mineral regions, knows that the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among the miners or by a consolidation of their claims through incorporated companies. Water is essential for the working of mines, and in many instances can be obtained only from great distances, by means of canals, flumes and aqueducts, requiring for their construction enormous expenditures of money, entirely beyond the means of a single individual. Often, too, for the development of claims, streams must be turned from their beds, dams

built, shafts sunk at great depth, and flumes constructed to carry away the debris of the mine. Indeed, successful mining, whether on lode claims or placer claims, can seldom be prosecuted without an amount of capital beyond the means of the individual miner.

There is no force in the suggestion that a separate patent for each location is necessary to insure the required expenditure of labor upon it. The statute of 1872 provides that on each claim subsequently located, until a patent is issued for it, there shall be annually expended in labor or improvements one hundred dollars; and on claims previously located an annual expenditure of ten dollars for each one hundred feet in length along the vein; but where such claims are held "in common," the expenditure may be upon any one claim. As these provisions relate to expenditures before a patent is issued, proof of them will be a matter for consideration when application for the patent is made. It is not preceived in what way this proof can be changed or the requirement affected, whether the application be for a patent for one claim or for several claims held in common. Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material. It would be absurd to require a shaft to be sunk on each location in a consolidated claim, when one shaft would suffice for all the locations; and yet that is seriously argued by counsel, and must be maintained to uphold the judgment below.

The statutes provide numerous guards against the evasion of their provisions by parties seeking a mining patent, and afford an opportunity to persons in the neighborhood of the claim to come forward and present any objections they may have to the granting of the patent desired. By Sects. 6 and

7 of the act of 1872, which constitute Sects. 2325 and 2326 of the Revised Statutes, the procedure which a party seeking a patent, whether an individual or an association or a corporation, must follow is prescribed:

1st. The party must file an application in the proper land office under oath, showing a compliance with the law, together with a plat and the field notes of the claim, or "claims in common," made by or under the direction of the Surveyor-General of the United States, showing the boundaries of the claim or claims, which must be distinctly marked by monuments on the ground.

2d. Previously, however, to the filing of the application, the claimant must post a copy of the plat, with a notice of his intended application, in a conspicuous place on the land embraced in it, and file an affidavit of at least two persons that such notice has been duly posted with a copy of the notice in the land office.

3d. When such application, plat, field notes, notice and affidavits have been filed, the register of the land office is required to publish a notice of the application for the period of sixty days, in a newspaper to be designated by him, nearest to the claim, and post such notice in his office for the same period.

4th. The claimant, at the time of filing his application, or at any time thereafter within sixty days, is required to file with the register a certificate of the United States Surveyor-General, that five hundred dollars' worth of labor has been expended, or improvements to that amount have been made upon the claim by himself or grantors; that the plat is correct, with such further description, by reference to natural objects or permanent monuments, as shall identify the claim, and furnish an accurate description to be incorporated in the patent.

5th. At the expiration of sixty days the claimant is required to file his affidavit showing that the plat and notice have been posted in a conspicuous place on the claim during the period of publication. If no adverse claim shall have been filed with the register and receiver of the proper land office within the sixty days of publication, it is then to be assumed that the applicant is entitled to a patent upon the pay-

ment to the proper officer of five dollars per acre, and that no adverse claim exists.

6th. The statute then proceeds to declare that if an adverse claim is filed during the period of publication, it must be upon the oath of the party making it, and must show the nature, boundaries and extent of such adverse claim; and all proceedings, except the publication of the notice and the making and filing of the affidavit, shall be thereupon stayed until the controversy shall have been settled by a decision of a court of competent jurisdiction or the adverse claim waived. And it is made the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and to prosecute the same with reasonable diligence to final judgment; and a failure to do so is to be deemed a waiver of his adverse claim. After judgment has been rendered in such proceedings, the party entitled to the possession of the claim, or any portion of it, may file a certified copy of the judgment roll with the register of the land office, together with a certificate of the Surveyor-General that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and must pay to the receiver five dollars an acre for his claim, together with the proper fees; and then the whole proceedings and the judgment roll are to be certified by the register to the commissioner of the general land office, and a patent thereupon issued for the claim, or such portion thereof as the applicant, by the decision of the court, shall appear to be entitled to.

It will thus be seen that if an adverse claim is made to the mining ground for which a patent is sought, its validity must be determined by a local court, unless it be waived, before a patent can be issued. There would seem, therefore, to be more cogent reasons in cases where a patent for such ground is relied upon, to maintain the doctrine which we have declared, that it can not be assailed in a collateral proceeding, than in the case of a patent for agricultural land.

But it is unnecessary to pursue the subject further. The judgment of the court below must be reversed and the cause remanded for a new trial; and it is so ordered.

Mr. Justice MILLER and Mr. Justice HARLAN dissented.

NOTE.—*Smelting Company* v. *Ray*, error to the Circuit Court of the United States for the District of Colorado, was argued at the same time as the preceding case, and by the same counsel for the plaintiff in error, and by Mr. THOMAS M. PATTERSON for the defendants in error.

Mr. Justice FIELD remarked that, as it presented the same questions there determined, the judgment of the court below must be reversed and the cause remanded for a new trial.

Mr. Justice MILLER and Mr. Justice HARLAN dissented.

1. Conclusiveness and scope of grant in patent: *Boggs* v. *Merced M. Co.*, 10 M. R. 334.

2. Action of land department in issuing patent is conclusive as to legal title: *Silver Bow Co.* v. *Clarke*, 5 Pac. 570.

3. Condition in patent not authorized by law is void: *Clary* v. *Hazlett*, 7 Pac. 701; *Talbott* v. *King*, 9 Id. 434; *Silver Bow Co.* v. *Clarke*, 5 Id. 570 *Deffeback* v. *Hawke*, 115 U. S. 392.

4. Placer patent carries title to surface as well as to land beneath surface: *Deffeback* v. *Hawke*, 115 U. S. 392.

5. A receiver's receipt passes title: *Id.*

6. It is not ground to set aside patent that it should not have been issued to patentee. Plaintiff must show better right in himself: *Sparks* v. *Pierce*, 115 U. S., 408.

7. Where a claim was conveyed to applicant who gave bond to make title to grantor after patent obtained, the penalty was not to be considered as liquidated damages: *Turck* v. *Marshall M. Co.*, 5 Pac. 858; 8 Colo. 113.

8. Prior patentee need not adverse subsequent application: *Mantle* v. *Noyes*, 5 Pac. 856.

9. Conflict of lode and placer: *Id.*

10. It is only when description is so indefinite that identity of ground can not be determined that the grant is to be held void for uncertainty: *Cullacott* v. *Cash M. Co.*, 6 Pac. 211; 8 Colo. 179.

11. Respective rights of lode patent and town site patent considered: *Talbott* v. *King*, 9 Pac. 434.

12. A patent proves of itself a valid location: *Id.*

13. All adverse claims are barred by issuance of a patent: *Raunheim* v. *Dahl*, 9 Pac. 892; *Wolfley* v. *Lebanon Co.*, 13 M. R. —.

14. A placer patent conveys title to a lode not then known to exist: *Raunheim* v. *Dahl*, 9 Pac. 892; *Montana Copper Co.* v. *Dahl*, 9 Pac. 894; *Contra* as to known lodes: *Reynolds* v. *Iron Silver Co.*, 116 U. S. 687.

15. Declaring party in the wrong to hold as trustee: *Rose* v. *Richmond Co.*, 17 Nev. 26.

16. A patent carries riparian rights: *Vansickle* v. *Haines*, 15 M. R.—

17. Patent when subject to water rights previously acquired: *Barnes* v. *Sabron*, 4 M. R. 673; *Osgood* v. *Eldorado Co.*, 5 M. R. 27.

18. Patents in confirmation of Mexican grant invest patentee with ownership of precious metals: *Ah He* v. *Crippen*, 10 M. R. 367; *Moore* v. *Smaw*, 12 M. R. —. The same as to direct patent: *Pacific Co.* v. *Spargo*, 16 Fed. 348.

19. Right to follow unpatented vein into patented ground: *Blake* v. *Butte M. Co.*, 9 M. R. 503.

20. Patent does not relate back to pre-emption so as to affect intervening appropriation of water: *Osgood* v. *Eldorado Co.*, 5 M. R. 37.

21. A patent issued pending an adverse claim is void: *Rose* v. *Richmond Co.*, 17 Nev. 26; 114 U. S. 576. Filing adverse suspends right to issue patent: *Id.*

22. State entitled to injunction to prevent removal of mineral from State lands pending proceedings to cancel patent: *People* v. *Morrill*, 26 Cal. 337.

23. Patent includes all veins having their tops or apices within the surface patented: *Iron Silver M. Co.* v. *Cheeseman*, 9 M. R. 552.

24. An equitable title must yield to that which the patent conveys: *U. S.* v. *Southern Colorado Co.*, 18 Fed. 273.

25. A patent to fictitious grantee is void: *Id.*; *Moffat* v. *U. S.*, 112 U. S. 24.

26. In a suit to set aside patent burden of proof is on complainant to prove even his negative allegations, but slight evidence will be sufficient to shift it. Non-existence of alleged patentees may be shown by evidence of witnesses who lived in the neighborhood and would presumably have known them: *Id.*

27. Prior applicant for patent need not adverse later application: *Steel* v. *Gold Co.*, 18 Nev. 80.

28. Right to lode dipping under patent: *Pacific Co.* v. *Spargo*, 16 Fed. 348.

29. Fraud to set aside patent must be fraud extrinsic to the matter tried in the land office: *U. S.* v. *White*, 17 Fed. 561; *U. S.* v. *San Jacinto Tin Co.*, 23 Fed. 279. The representations must have been falsely and fraudulently made. A mistake as to character of land will not suffice: *U. S.* v. *Iron Silver Co.*, 24 Fed. 568.

30. On such bill the United States must tender purchase money: *U. S.* v. *White*, 17 Fed. 561.

31. Proceedings to vacate coal lands though patented without fraud: *U. S.* v. *Mullan*, 10 Fed. 785.

32. Patent not to be collaterally attacked. Not to be impeached by trespassers: *Cowell* v. *Lammers*, 21 Fed. 200.

33. Patent to railroad set aside because ground known at the time to contain minerals: *McLaughlin* v. *U. S.*, 107 U. S. 526; *West. Pac. R. R.* v. *U. S.*, 108 U. S. 510.

34. Railroad patent on mineral lands. Conclusiveness of patent. A mine can not be located on patented land although mines were excepted out of the grant: *Cowell* v. *Lammers*, 21 Fed. 200.

35. A town site entry is inoperative as against land within its limits of known mineral value: *Deffeback* v. *Hawke*, 115 U. S. 392; *Pierce* v. *Sparks*, 22 N. W. 491 (Dak.).

36. Patent title relates back to entry: *City of Denver* v. *Mullen*, 7 Colo. 345.

37. Monuments to control courses in patent calls need not be "unquestionable:" *Cullacott* v. *Cash M. Co.*, 8 Colo. 179. If identity of the grant is possible, misdescription does not invalidate: *Id.*

38. An act of Congress containing no words of present grant does not operate to convey land: *Schwenke* v. *Union Co.*, 7 Colo. 512.

39. The proof to set aside patent must be unequivocal: *U. S.* v. *Maxwell Land Grant*, 26 Fed. 118; *U. S.* v. *Iron Silver Co.*, 24 Fed. 568.

40. A patent may be set aside for false representations: *Moffat* v. *U. S.*, 112 U. S. 24.

HANCOCK ET AL. v. HODGSON ET AL.

(4 Bingham, 269; 13 Eng. Com. Law, 499. Court of Common Pleas, 1827.)

Directors' contract securing purchase money. By a deed which recited that defendants, the directors of a mine company, had purchased a mine for £4,500, to be paid within a twelvemonth, out of the moneys to be raised by the company, with a proviso that the directors should be allowed six months further time, in case the bankers of the company should not within the twelvemonth have received sufficient deposits from the subscribers to enable the directors to pay thereout, the directors covenanted that out of the payments so to be made by the subscribers, they would pay the purchase money, at time specified, subject to the aforesaid proviso: *Held*, that the directors were personally responsible at the expiration of the eighteen months.

The plaintiffs declared in covenant on certain articles of agreement under seal between the plaintiffs on the one part, and the defendants, directors of the company or association thereinafter mentioned, of the other part. The agreement as set out on oyer, after reciting, among other things, that there was about to be formed a joint-stock company, whereof the defendants had been chosen to act as directors for and on behalf of themselves and the other members and shareholders of the company; and that, as such directors, they had agreed with the plaintiffs to purchase their estate and interest in the East Down's mine, in the manor of Gooncarl, in Cornwall, proceeded as follows:

"And whereas the said directors (the defendants) do hereby agree with E. Y. Hancock and R. Vazie (the plaintiffs) to purchase their estate and interest in the said mine, comprising both the copper and copper ore, tin and tin ore, and all other metals and minerals whatever, under or by virtue of the said in part recited indenture and agreement, but subject as hereinafter mentioned, at the price or sum of £4,500, to be paid and payable out of the moneys to be raised by the said company at the times and in manner hereinafter mentioned; that is to say, the sum of £1,000 in part payment of the said purchase money, by the following installments: the sum of £300 at the time of executing these presents; the further sum of

£200 on or before the 22d day of August instant; and the further sum of £500, being the remainder of the above mentioned £1,000, on or before two months from the date hereof, being the 3d day of October next; and the balance of the said purchase money, that is to say, the sum of £3,500 within twelve months from the date of these presents, by four quarterly and equal payments or installments of £875 each, the first installment to be made on or before the 3d day of December next, being the period of two months from the intended completion of the payment of the deposit of £1,000, as aforesaid; provided always, and it is hereby expressly agreed by and between the several parties hereto, that in case there shall not have been received by the bankers of the said company, or by the directors for the time being, the deposits or installments due from the several shareholders, so as to enable the said directors to pay the balance due on account of the said purchase money at the times hereinbefore mentioned, then and in such case the said directors shall be allowed, and are hereby allowed, a further time to pay such balance until six months after the time or times when the said quarterly installments become due."

The covenant whereupon was: "And the said directors, parties hereto, do hereby promise and agree that out of the said payment so to be made by the subscribers or shareholders in the said company, they will pay or cause to be paid unto the said E. Y. Hancock and R. Vazie, the said purchase money or sum of £4,500, or so much thereof as shall remain due and payable, according to the terms and at the times before specified, subject, nevertheless, to the aforesaid provisos and conditions."

Breach: non-payment according to the covenant.

The defendants pleaded, among other matters:

1. That no money had been raised by the said company, or any payments made by the subscribers or shareholders, applicable to the payment of the said purchase money, except to the amount of £1,000, which £1,000 the defendants paid, and the plaintiffs received in satisfaction and discharge of the said sums of £300, £200 and £500, in the articles of agreement mentioned.

2. That there had not been received by the bankers of the

company, or by the directors for the time being, the deposits or installments due from the several shareholders in the company, so as to enable the directors or the bankers to pay the balance of the purchase money in the declaration mentioned.

3. That no payments had been made by the subscribers or shareholders in the company, so that the moneys in the declaration alleged to be in arrear could be paid thereout.

To these pleas there was a general demurrer and joinder.

WILDE, Serjt., who was to have argued in support of the demurrer, was stopped by the court, when

TADDY, Serjt., for the defendants, contended, that upon this agreement, they were not individually responsible as directors for debts incurred for the benefit of the whole company. By the language of the agreement it was expressly stipulated that the money was to be paid out of the funds raised by the subscriptions of the shareholders. This, therefore, could not be binding on the directors personally; they had given no positive promise to pay, but only on condition that the money should be raised by the subscriptions of others. In cases of bills of exchange and promissory notes it had been held that a party was not personally responsible for the payment of a bill drawn on particular funds: *Dawkes* v. *Delorane*, 3 Wils. 207; *Jenny* v. *Herle*, Ld. Raym. 1361. In the present case there was no unconditional promise or agreement to pay, and it was improbable that any persons would render themselves personally responsible for a debt from which they had no probability of ever receiving any benefit.

BEST, J.—I think the directors are clearly liable on this deed. The cases which have been cited do not apply, having merely decided that instruments ordering a sum to be paid out of a particular fund are not negotiable as bills of exchange or promissory notes, but looking at the whole of this deed, which must be taken most unfavorably against the covenantors, there can be no doubt that the defendants have rendered themselves personally liable. The deed states that £200 is to be paid at the time of executing those presents; £300 on the 22d of August; £500 in two months; and £3,500 at the end of twelve months; provided, that the directors shall be allowed six

months' further time, in case the installments from the shareholders shall not have been received. The obvious meaning of this is, that the directors are to pay in twelve months, in case the subscriptions shall have been received in the interval, but that they shall pay in eighteen months at all events, whether subscriptions shall have been received or not. The advantage or disadvantage of such a contract to the directors is a question for them to consider, and not the court.

PARK, J.—The cases cited only show that instruments made payable out of a particular fund are not negotiable, and do not apply to the case before the court. I am clearly of opinion, that upon this agreement the defendants are liable. It is stipulated, indeed, that the £4,500 is to be paid by installments, and that the time of payment is to vary according to circumstances; but no intention is intimated to leave the plaintiffs remediless in case of failure of any subscription fund; the object, on the contrary, of the six months further time must have been to enable the defendants to pay out of their own pockets, in case of the subscriptions failing.

The rest of the court concurring,

Judgment was given for the plaintiffs.

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1. *Venue.*—A bill for an account of the produce of an oil well must be filed in the county where the well is situate. *Thompson* v. *Noble*, 137

2. *Services of expert accountant.*—In a suit for an accounting, an allowance was properly made for a reasonable sum paid by complainant to a competent accountant for the purpose of arriving at an adjustment, the services being necessary and of use to all parties and therefore a common charge on them. *Godfrey* v. *White*, 562

3. *Accounting, as an incident.*—When a proceeding for partition of realty is had in a court of equity, the court will not only proceed to divide the land but will, in a proper case, direct an accounting, and do equity in the case by making parties account for rents, etc. *Dall* v. *Confidence M. Co.*, 214

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ADMISSIONS.

1. *Admissions by corporate officer.*—Evidence of declarations of the president of the company that the cost of repair would not exceed $500 was admissible for the purpose of showing that the parties did not intend an iron bottom, which would cost several thousand dollars. *Ardesco Oil Co.* v. *Richardson*, 131

2. *Presence of officer.*—Evidence that the president was present whilst the repairs were going on, and expressed his satisfaction with them, was admissible. *Id.*

3. *Evidence—Admissions of agent.*—In a suit against copartners for wages, the declaration of a party in the employ of the defendants as to the intention of one of the defendants to pay in a few days is not competent evidence unless his agency for that purpose is first established. *LeFevre* v. *Castagnio*, 579

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ADVERSE CLAIM.

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ADVERSE POSSESSION.

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2. *Agent to purchase may repudiate his agency.*—If one who is clearly an agent for another to purchase property, repudiate the agency and act for himself, using his own funds, he can not be declared a trustee for his principal, although the latter may have been misled by the former. *First Nat. Bank* v. *Bissell*, 547

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1. *Improvements on group of locations constituting one claim.*—Improvements on one of a group of locations, constituting a consolidated claim, or work done at a distance from the claim, as in the case of operations to lead water to, or carry tailings from the claim, apply as labor under the mining acts. *St. Louis Smelting Co.* v. *Kemp*, 673

APPEAL.

1. *Jurisdiction on appeal—How determined.*—Where a plaintiff appeals against a judgment for the defendant, the jurisdiction of the Supreme Court, as to amount, is determined by the complaint. Where the plaintiff appeals from a judgment in his favor, then it is the difference between the judgment and the sum claimed. Where the defendant appeals from a judgment in his favor, the amount in dispute is the difference between the judgment and the counter-claim. *Skillman* v. *Lachman*, 381

2. *Appeal can only be dismissed by appellate court.*—The District Court of the United States having granted an appeal to the Supreme Court, has no power to set its order aside. The jurisdiction of the Supreme Court attaches upon the appeal being granted, and only on application to the Supreme Court could the appeal be dismissed. *McGarrahan* v. *New Idria Co.*, 641

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ASSIGNMENT.

1. *Judgment and assignment distinguished.*—A judgment is not an assignment. One is the act of the party, the other the act of the law. A judgment by confession can have no tendency to defeat a statute which provides for an equal distribution among all creditors in cases of assignments, for the statute does not apply to such a case. *Breading* v. *Boggs*, 296

ASSIGNMENT. *Continued.*

2. *Assignment of account by partner.*—Where a partner can not sue the company at law, nor maintain attachment, his assignee is in no better situation than the assignor before the assignment. *Bullard* v. *Kinney*, 348

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1. *Note reciting contract annexed—No contract found.*—In an action on a promissory note, the note purported to be "For value received in Pennance shares, pursuant to annexed contract." No contract was in fact annexed. *Held*, that this special description of the consideration for the note did not render it incumbent on the plaintiff to put in any contract or other document besides the note itself, in order to establish his case. *Fox* v. *Frith*, 277

2. *Where the note of the mining firm is sued on*, the plaintiff must prove that the person executing the same had authority to subscribe the company's name. *Skillman* v. *Lachman*, 381

3. *Verbal agreement to vary note.*—In a suit by one partner upon a note executed by his copartner the defense was that the plaintiff agreed, at the time of the making of the note, to provide for and pay one third thereof, if the company should not be in funds for that purpose when it became due: *Held*, that the facts if proved would not constitute a defense; that it would be incompetent for the defendant to vary the terms of the note, or relieve himself from liability thereon, by evidence of a verbal agreement made before or at the time of making the instrument. *Crater* v. *Bininger*, 488

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1. *Boundary along a meandering stream.*—Where land adjoining a creek was described in a patent as bounded on the side of the creek by a line meandering from a point in its center down the center a certain distance to a station on the bank, and thence a further distance to another station, and so on from station to station on the bank, to a point where the line left the creek. it was *held*, that the creek constituted the boundary of the land, and that the courses between the stations only indicated the general direction of the stream, being points fixed by the surveyor to enable him to compute the amount lying between the creek and the other boundaries. *Quicksilver Co.* v. *Hicks*, 98

2. *A traditional survey* agreed at one time to have been made and supposed to have been at that time made, but never satisfactorily proved and a subject of continued contention, can not be treated by courts as binding upon the parties, although they have attempted to fix it by subsequent survey. *Blewett* v. *Coleman*, 160

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1. *Strict interpretation of contract affected by loose observance of both parties.*—The defendants contracted to deliver to the plaintiffs a quantity of oil, "to be paid for in lots as delivered, the delivery to be commenced immediately and pursued with all due diligence till completed." Both parties having taken great latitude in delivery and payment, without manifesting an intention to hold each other to a strict performance, it was *held* no error to instruct the jury that the defendants, upon a payment not being made on demand, could not rescind the contract without warning the plaintiffs of their intention to insist on a literal compliance. *Forsyth* v. *North Am. Co.*, 115

2. *Idem.*—If the contract had been previously performed literally, and the plaintiffs had refused payment, the defendants might have rescinded the contract. *Id.*

3. *Extent of repairs.*—Evidence of the amount expended in making the repairs was admissible as pertinent to the question of the breach of contract and as to damages. *Ardesco Oil Co.* v. *Richardson*, 131

4. "*Repair*" *means* to restore to its former condition, not to change either the form or material. *Id.*

See BILLS AND NOTES, 1; CORPORATION, 1; DITCH, 4; EVIDENCE, 3; FRAUD, 1; MASTER AND SERVANT, 1; OIL, 3, 4, 6; OPTION, 1, 2; PARTNERSHIP, 93.

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1. *Recovery of oil taken by trespasser.*—The severance of oil from the freehold does not divest the title of the owner, nor deprive him of his right of immediate possession, nor prevent his recovery of the oil so taken by action of replevin, or of its value from the one who took it from the well. *Hail* v. *Reed*, 103

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1. *Construction of deeds.*—In the construction of deeds the technical rules of the English books must be applied—with reference to the ignorance of the American scrivener. *French* v. *Brewer*, 108

2. *Verbal sale of mining claim.*—A verbal sale of a mining claim, even if accompanied with a delivery of possession, does not pass the legal title. *Gollar* v. *Fett*, 171

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1. *Contract between corporation and stockholders.*—A contract between a corporation and parties owning a controlling interest in the stock the court will carefully scrutinize, and may refuse to enforce its unjust provisions. *Flint* v. *Eureka Co.*, 588

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1. *Where all the parties to a partnership accounting appealed*, and the case was so disposed of that neither prevailed rather than another, the cost of printing the record was apportioned according to the interest of the parties in the firm, and in other respects each party paid his own costs. *Godfrey* v. *White*, 563

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1. *Depositions signed without reading.*—Deponents can not waive the reading of their depositions before signing them; depositions so signed are inadmissible in evidence. *Godfrey* v. *White*, 563

DESCRIPTION—See LOCATION CERTIFICATE, 1.

DITCH.

1. *A ditch is real estate*, and each interest may be sold or incumbered without regard to the consent of the co-proprietors. *Bradley* v. *Harkness*, 389

2. *Ditch owners are tenants in common.*—In the absence of any special facts, the co-owners of a ditch are to be considered tenants in common, and from the mere fact of co-ownership, no partnership can be presumed. *Id.*

3. *Note of ditch company.*—If an unincorporated ditch company authorizes its superintendent to give the company note for materials before then purchased by the company, all the members are bound by the note, whether they were such members when the materials were purchased or not. *McConnell* v. *Denver*, 432

4. *Company contract limited to proceeds of ditch.*—If lumber is furnished a ditch company under the agreement that it is to be paid for *out of the proceeds* of the ditch of the company, and the proceeds have all been faithfully applied in payment according to the agreement, the person who furnishes it is not entitled to recover the deficiency against the members of the company. *Id.*

See NEGLIGENCE, 4; NUISANCE, 4, 18; PARTITION, 19; PARTNERSHIP, 43, 70–72.

EJECTMENT.

1. *General issue in ejectment.*—Under the denial of the title of the plaintiff in the answer, the defendant can give in testimony any title in himself at the commencement of the suit, without specially pleading it. *Kahn* v. *Old Telegraph Co.*, 645

2. *Title acquired after suit brought.*—Any title to the premises in dispute that accrued to the defendant after the commencement of the suit must be set up by a supplemental answer; otherwise defendant can not avail himself of it. *Id.*

3. *Title lost after suit brought.*—Where it is claimed that the plaintiff's right has terminated during the pendency of the action, the fact can not be shown unless pleaded by a supplemental answer by defendant; otherwise if the fact appears from the plaintiff's own evidence. *Id.*

4. *Defendant not confined to one title.*—In ejectment, under a claim of the defendant that he is the owner of the vein in controversy, he can support such claim by showing all the titles he may have covering the ground sued for. *Id.*

5. *In ejectment the question is as to who has the better title;* but before a defendant can prevail on an inferior or equitable title, he must first become an actor and invoke equitable affirmative relief. *Id.*

6. *An equitable defense may be set up in ejectment*, but such defense must contain all the essentials of a bill in equity, and the issue thus made is triable by the court without a jury as an equitable issue. *Id.*

EJECTMENT. *Continued.*

7. *This rule does not avail a plaintiff who bases his claim on a legal title*, and is met by a superior legal title of defendant; in such case he can not be permitted to attack the title of defendant on purely equitable grounds. *Id.*

See TENANT IN COMMON, 2.

EQUITY.

1. *Subject-matter of jurisdiction in equity.*—The controversy in this case, which was one relating to the distribution among members of an unincorporated joint stock association, of the common fund arising from the final disposition of the entire assets of the company, is held to be one for equitable cognizance. *Butterfield* v. *Beardsley*, 495

2. *Distinction between law and equity inherent.*—While the forms of action have been abolished by the code, the inherent distinction between legal and equitable causes of action, and the remedies appropriate to each, are not changed. *Kahn* v. *Old Telegraph Co.*, 646

See PARTNERSHIP, 98.

ESTOPPEL.

1. *Statement of intention no estoppel.*—That a partner, having the option to renew such lease and continue the partnership, may have talked and acted as if he intended to do so, will not bind him to renew if he made no contract to do it. *Phillips* v. *Reeder*, 420

2. *Office of estoppel.*—Estoppels shut the mouth of a party, whether his original act or declaration was intended to deceive or not. *Kirk* v. *Hartman*, 450

3. *The element of mutuality in a judgment.*—In a case in which the findings and judgment are conclusive on both parties if conclusive on one, the estoppel is mutual within the rule, without regard to the question what would have been the effect, had the findings and judgment been different. *420 M. Co.* v. *Bullion Co.*, 608

4. *Judgment reversed to avoid estoppel.*—If a judgment is broader in its scope and more advantageous to the plaintiff than he is entitled upon the record to have it, it may be reversed, although there is no technical error, solely upon the ground that all the points covered by it would be *res adjudicata* and operate as an estoppel. *Id.*

5. *Grantee not estopped—Buying one's peace.*—One who purchases an adverse title to his premises is not estopped from denying that such title is not good. One has a right to "buy his peace." *Kahn* v. *Old Telegraph Co.*, 647

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EVIDENCE.

1. *Book entries not proof of sale.*—To make a book of entries admissible for any purpose, it should not only have been shown to have contained the original entry of the party but also to have been an account of his daily transactions, otherwise the entry will be simply a memorandum made by the party, to which he might refer to refresh his recollection, but ought not to be permitted as evidence to the court or jury in any sense. *Goodspeed* v. *Lead Works*, 178

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2. *Belief of interest explainable.*—The belief that a party is interested in a mine or the expression of that opinion does not conclude a party contrary to the fact. *Vice* v. *Anson*, 244

3. *Evidence to vary written contract.*—Evidence of declarations of a party to a written contract at an indefinite time prior to it, is not admissible to introduce a new term into the contract. *Kirk* v. *Hartman*, 450

4. *Evidence of negligence of agent.*—Evidence that other agents in similar business at the same places did much more business than the plaintiff, is not admissible to prove his negligence or default. *Id.*

See ADMISSIONS; BILLS AND NOTES, 3; EXPERT.

EXECUTORS AND ADMINISTRATORS.

1. *Construction* of devise of mines and iron works. *Crawshay* v. *Maule*, 223

2. *Probate jurisdiction*—"*Late resident.*"—A petition for letters of administration on an estate, stating that the deceased was "late a resident" of the county, etc., instead of stating that his residence was there "at or immediately preceding his death," in the language of the statute is sufficient to give jurisdiction. *Abel* v. *Love*, 350

3. *Public administrator—Letters unnecessary.*—A public administrator who has been duly authorized to administer upon an estate by the judgment of a court having jurisdiction, may show a grant of administration by producing a copy of the order. It is unnecessary that letters of administration be actually issued to him, at least a failure to issue the letters will not affect the jurisdiction. *Id.*

EXPERT.

1. *Distinction between expert and ordinary testimony.*—Expert testimony is given on questions of science, skill or art. On matters of common observation the witness states the facts only but the expert is allowed to add his opinion. *Kahn* v. *Old Telegraph Co.*, 646

2. *On the issue of vein continuity* expert testimony is admissible. *Id.*

3. *Opinions of experts are not the safest evidence*, but when they constitute the best available form of evidence, are resorted to from necessity. *Id.*

See ACCOUNT, 2.

FLOODING.

1. *Flooding one mine to save another.*—Where defendants, operating a coal vein, permitted plaintiffs, working on the same vein at a lower water level, to use a gangway belonging to defendants, which gangway connected the two workings, and where, upon the case of a freshet, defendants constructed a dam which diverted the water which threatened to come into their own workings, so as to necessarily enter the plaintiffs' workings through this gangway: *Held*, that the act was one of willfulness, and not of negligence; that evidence of counter negligence was inadmissible, and that the user of the gangway did not affect the relations of the parties. *McKnight* v. *Ratcliff*, 364

2. *Idem—The measure of damages was the actual injury* sustained in delay, loss of time, damage to machinery, etc., and if the mine was

FLOODING. *Continued.*

irreclaimable, then the value of the estate and property; but merely speculative profits, supposed to have been lost, can not be included; it was, therefore, error to instruct the jury that "if the mine was rendered entirely useless then the profits that might have been made out of the coal would be a fair basis for estimating damages. *Id.*

3. *Defendant misled by plaintiff's opinions.*—Where a point was presented by defendants, to the effect that if the plaintiffs had notified and informed the defendants that the water would escape before it could damage them, then any damages resulted from their own misrepresentations, for which they could not recover—it should have been affirmed, referring the special circumstances of the case to the jury. *Id.*

See MEASURE OF DAMAGES, 3.

FORFEITURE.

1. *Lease as firm assets—Forfeiture of lease.*—Where a lease is made of certain coal mines to two persons as tenants in common, and the lessees afterward associate themselves as partners for the purpose of mining, shipping and selling coal from the demised premises for the whole period of the lease, the leasehold is thereby converted into partnership assets, and becomes the property of the firm. If a stipulation in such lease provides that any transfer or assignment of the lease by the lessees, or permitting it to be seized in execution, should work a forfeiture of the lease, and enable the lessors to re-enter without prejudicing their right to claim damages from the lessees, such forfeiture is not incurred by a sale of the leasehold estate under a decree of a court of chancery as the property of the firm. *Patterson* v. *Silliman*, 327

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FRAUD.

1. *Misrepresentation defeats stipulation.*—Evidence is admissible to show that a material stipulation in a written agreement was founded on the misrepresentations and fraud of one of the parties. *Maute* v. *Gross*, 123

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INJUNCTION.

1. *Injunction against diversion of water—Pleading.*—In the complaint it was alleged that plaintiff had for several years conveyed water down a certain gulch for mining purposes, and had acquired a prior right to the enjoyment and use of the water; that defendants had diverted the water and deprived plaintiff of its use, and that defendants wrongfully claim some pretended and fictitious right to the use of the water. *Held*, that the allegation of defendants' pretended right did not prejudice the right of the plaintiff to an injunction. *Tuolumne Co.* v. *Chapman*, 34

2. *Facts preventing preliminary injunction.*—A preliminary injunction ought not to issue to prevent the sinking of an oil well, inflicting certain injury upon the defendants, while the benefit to the complainant is not clear and his title also uncertain; nor where the wells sought to be enjoined, if meanwhile sunk, would be a benefit to the complainant instead of an irreparable injury. *French* v. *Brewer*, 108

INJUNCTION. *Continued.*

3. *Equity jurisdiction, once acquired, extends to trespasses.*—As a general principle, when a court of equity has obtained jurisdiction for one purpose, it may retain it generally for relief, as well in cases of continuing trespass and waste as in cases of fraud, accident, mistake and account. *Allison's App.*, 142

4. *Prevention of multiplied suits.*—To prevent multiplicity of suits, a court of equity will decree an account of the damages or waste at the same time with an injunction, and make a decree to settle the entire controversy. *Id.*

See NUISANCE, 5, 6, 19, 24; OIL, 10; PLEADING, 2.

INTEREST.

1. *Usury.*—Annuity for years originating in an agreement for a loan, and producing more than a return of the principal and five per cent. interest, is usurious. *Fereday* v. *Wightwick*, 247

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JOINT STOCK CO.

1. *Joint stock company.*—A joint stock company is a partnership, the capital of which is divided, or agreed to be divided, into shares, so as to be transferable without express consent of all the copartners. *Hedges App.*, 463

2. *Joint stock association.*—The members of an unincorporated joint stock association engaged in boring for oil, sustained by money advanced by each, may, in a proceeding for the distribution of a common fund, be treated as partners. *Butterfield* v. *Beardsley*, 495

See PARTNERSHIP, 40.

JUDGMENT.

1. *Judgment in trust for miners and small creditors.*—A judgment given by a firm engaged in the iron business to a trustee, for use of the hands about their works and other small home creditors, in pursuance of a bond and declaration of trust specifying the amount due each creditor named therein, is not forbidden by law, the debts being justly due and the object being to save costs. *Breading* v. *Boggs*, 296

See ASSIGNMENT, 1; ESTOPPEL, 4.

JURISDICTION.

1. *Interest goes to make up the amount in dispute*, and if the interest added to the principal swells the judgment to the sum at which the court take jurisdiction, it is the same as if the principal had equaled that amount. *Skillman* v *Lachman*, 381

See ACCOUNT, 1; APPEAL, 1; PARTITION, 9, 17, 21; PARTNERSHIP, 119.

KNOWN MINES—See PATENT, 7.

LACHES.

1. *Laches affecting equities between copartners.*—One of a firm of oil refiners purchased in his own name a lot on which to erect a refinery; the firm took a lease of it from him, and erected buildings on it. *Held*, that after accepting such lease, erecting the buildings, and delaying for years to assert title until the relations of the parties became altered and

LACHES. *Continued.*

complicated, it was too late for the firm to claim relief in equity by bill calling for a conveyance. *Slemmer's App.*, 438

2. *The maxim vigilantibus non dormientibus leges subveniunt* applies in equity as well as law. *Id.*

LANDS—See MINES, 1, 2.

LEASE.

1. *Construction of oil lease drawn before oil wells were known.*—An instrument purporting to be a grant or license to take oil, drawn by an ignorant scrivener, and at a time when the nature or value of the mineral was not known, ought to be construed with reference to the subject-matter, and the knowledge of such subject-matter at the time; and as to its inartificial use of technical language the whole scope of the paper is to be considered. *French* v. *Brewer*, 108

2. *Rights of lessee of one co-tenant.*—A party who has mined ore as tenant of one of several co-owners, may recover in trespass against another of the co-owners for taking away the ore so mined by such tenant; otherwise, if he fail to prove the alleged lease or license under which he mined the ore. *Blewett* v. *Coleman*, 160

3. *The receipt of rent* is evidence of ratification. *Id.*

4. *New partners in oil lease—Quantum meruit.*—A and B purchased an interest in an oil lease; shortly afterward, C and D became partners with them, and these four employed E as overseer with a joint interest; E hired F to work by the day in sinking a well. After he commenced work, three new partners came into the concern. Against these eight persons F brought suit for his wages. *Held*, that the partners who came into the concern after the contract had been made were not liable upon the contract, and that the mode in which interests in oil leases were sold, divided and subdivided, while work was going on, could not alter the rule; but that the new partners would be liable upon a *quantum meruit* for work done after they came into the firm. *Babcock* v. *Stewart*, 447

See FORFEITURE, 1; NOTICE, 3; OIL, 9; PARTNERSHIP, 3, 47, 61, 62.

LIEN.

1. *Lien of partner.*—When a managing partner, a co-lessee, working mines, becomes indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday* v. *Wightwick*, 247

2. *Lien of partner against assets.*—It is a general principle, applicable to this case, that each member of a partnership has a specific lien on the partnership property, not only for the debts and liabilities due to third persons, but also for his own share of the capital stock and funds and for all moneys advanced by him for the use of the concern. *Duryea* v. *Burt*, 395

3. *Real estate as partnership assets.*—Real estate acquired by mining partners for the purpose of the partnership concern, is subject to all the debts of the partnership and subject to the debts of one of the partners incurred in the administration of the property. *Id.*

4. *Purchase of interest subject to lien—Notice, when presumed.*—If

LIEN. *Continued.*

the interest of a mining partner in the common property is purchased while another party has a lien against such interest, the lien subsists after the conveyance, unless it is lost by reason of the purchase being in good faith for a valuable consideration, without notice of the existence of such lien; and if the purchaser is apprised of facts sufficient to put him on inquiry and to lead him by a diligent investigation to discover the truth, he will be deemed to have notice of the truth. *Id.*

See MORTGAGE, 1; NOTICE, 5.

LOCATION.

1. *"Location" and "Mining Claim" distinguished.*—A mining claim may embrace one or more locations. *St. Louis Co.* v. *Kemp*, 673

See ANNUAL LABOR, 1; PATENT, 5; PLACER, 1; PUBLIC DOMAIN, 1, 4.

LOCATION CERTIFICATE.

1. *A notice of location of a mining claim should contain a description of the premises* located, and the same should be marked on the ground. *Kahn* v. *Old Telegraph Co.*, 647

See PATENT, 13.

LODE—See EXPERT, 2.

MARRIED WOMEN.

1. *Suit concerning wife's separate estate.*—In proceedings for an account of the proceeds of the wife's separate estate the husband can not sue alone without joining his wife in the bill. *Thompson* v. *Noble*, 137

MASTER AND SERVANT.

1. *Indefinite hiring.*—When one is employed as an agent, etc., for no definite time, it is a hiring at will of both parties, and he may be discharged without notice. *Kirk* v. *Hartman*, 450

2. *Debt will lie on a contract for service* for a determinate time and fixed compensation, when the servant is dismissed before its expiration. *Id.*

3. *Mitigation of damages.*—In an action of debt upon a contract of hiring by a servant discharged before his term, his being engaged in other profitable business or refusing it if offered, may be shown by the defendant (on whom is the burden) in mitigation of damages. *Id.*

See AGENT, 1; NEGLIGENCE.

MEASURE OF DAMAGES.

1. *Animus—Where immaterial.*—Where the claim of the plaintiff is only for compensatory damages, and not founded on the *animus*, but on the acts of the defendant, it is not material whether or not the defendant knew the extent of the injury he was committing. *Wheatley* v. *Chrisman*, 24

2. *Damages for trespass on gold claim.*—The damages for wrongfully removing the gold-bearing earth from a claim, and extracting the gold therefrom, are the value of the gold less the expense of digging the gold-bearing earth and separating it from the realty, so as to make it personal property. *Goller* v. *Fett*, 171

3. *Sluicing away bed-rock and reservoir.*—Damages allowed by the referee for the washing away of bed-rock by the plaintiff in sluice mining,

MEASURE OF DAMAGES. *Continued.*
which, from the facts found, were altogether hypothetical, were properly stricken out by the court below; but damages for the destruction of defendant's reservoir should have been allowed. *Jones* v. *Clark*, 474
See FLOODING, 2; MASTER AND SERVANT, 3.

MEXICAN GRANT—See PATENT, 10.

MINERALS.
1. *Estate in minerals, a fee simple and partible.*—The grantee, by deed of the mines and minerals under land, has an estate of inheritance, and an estate in fee simple in the minerals, though another have the fee simple in the soil, and such an estate as is capable of partition under the statutes, though a mere license to mine may be non-partible. *Canfield* v. *Ford*, 201
2. *Title in U. S.*—It is a conceded doctrine that mines of precious metals "belong to the eminent domain of the political sovereignty." *Gold Hill Co.* v. *Ish*, 635
See OIL, 7.

MINERAL LANDS.
1. *The returns of the surveyor* are not conclusive as to the mineral character of lands. *Gold Hill Co.* v. *Ish*, 635

MINES.
1. *Corporeal hereditament.*—An estate in mines is a corporeal hereditament. *Canfield* v. *Ford*, 201
2. *Lands, tenements and hereditaments*, defined. *Id.*

MINING CLAIM—See LOCATION, 1; PUBLIC DOMAIN.

MORTGAGE.
1. *Mortgage securing old debt.*—The mortgagee, in a mortgage to secure an antecedent debt, is not regarded as a purchaser, and therefore the lien of his mortgage will be postponed to that of a prior but unrecorded one. *Bybee* v. *Hawkett*, 594
2. *Attempted set-off by junior mortgagee.*—In a suit to enforce the lien of a mortgage, a subsequent mortgagee, who is made defendant on that account, can not set up a claim or have a decree against the plaintiff for the amount of his debt upon the ground that the plaintiff is personally liable to him therefor as partner of his mortgagor. *Id.*
See PARTITION, 19.

NEGLIGENCE.
1. *Co-employe—Superior and inferior servant.*—A corporation is not liable for injuries suffered by an employe through the negligence of a co-employe of a different grade, not vested with authority in the general management of the corporate business, notwithstanding such co-employe is higher in authority than the one receiving the injury. *Peterson* v. *Whitebreast Co.*, 1
2. *Miner killed while off duty.*—An employe in a coal mine left the room where he was at work, and went to another, according to custom, to visit some other employes there at work, and while there the roof fell in, by reason of the decay and insufficiency of the supports, and killed

NEGLIGENCE. *Continued.*

him. *Held*, that not being engaged in the line of his duty at the time of the injury he stood in the same relation as a visitor to the mine and could not complain of defendant's negligence. *Wright* v. *Rawson*, 3

3. *Statute construed—Fellow servant's contributory negligence.*—A lad about thirteen years old was employed as a slate picker in a coal breaker. Another lad who was attending the machinery called to him to bring him the oil can; he left his post, and in taking the can fell into a pair of rollers breaking coal where he was severely injured. It appeared that the rollers were covered with a box upon the top of which was an opening covered by a plank, which was displaced at the time of the accident, and was so often before with the knowledge of the injured boy. *Held*, that the provision in the act of March 3, 1870, that all machinery where boys work shall be properly "fenced off" was intended to mean properly protected, and that in providing this cover for the rollers the employer did his whole duty under the act. *Held, further*, that if the cover was unnecessarily removed without the fault or knowledge of the employer, through the negligence of one of the employes, there could be no recovery according to well settled principles. *Held, further*, that the conduct of the b y presented a case of contributory negligence. *Honor* v. *Albrighton*, 6

4. *Prior appropriation as affecting accidental injuries.*—There is no doubt that ditch owners would be responsible for wanton injury or gross negligence, but they are not liable for mere accidental injury to a claim located subsequent to the construction of the ditch, if no negligence is shown. *Tenney* v. *Miners' Ditch Co.*, 31

See EVIDENCE, 4; FLOODING, 1; PARTNERSHIP, 121.

NET PROFITS—See PARTNERSHIP, 25, 29.

NOTICE.

1. *Notice by possession under unrecorded deed.*—Possession of real estate by the grantee in a prior unrecorded deed is not of itself conclusive notice of the grantee's title to a subsequent purchaser whose deed is first recorded, but such possession is evidence tending to prove notice. *Fair* v. *Stevenot*, 11

2. *Idem—Diligent inquiry by purchaser.*—If the grantee in a prior unrecorded deed relies alone on the fact of possession of the property sold to show notice to a subsequent purchaser whose deed is first recorded, the subsequent purchaser may show in rebuttal that he used due diligence in making inquiry, and failed to obtain a knowledge of the prior unrecorded deed. *Id.*

3. *Possession of lessee—Notice of his interest.*—The principles which govern mining leases, that actual possession of the tenant carrying on the mining operations is notice of his interest to a third person as fully as is the tenancy of a dwelling house, and that if the lease is for a term not exceeding three years it is valid, though not in writing, apply to a lease of land with right to quarry minerals or dig clay. *Sheets* v. *Allen*. 16

4. *Instruction as to notice and demand.*—The instruction as to notice and demand, as modified, read as follows: "If you find from the evidence that the stocks mentioned in the complaint were sold by McConnell & Co.,

NOTICE. *Continued.*

pursuant to a lawful notice to the plaintiff that they would be so sold if she failed to make her margins good within a time specified by the notice, and that the plaintiff did so fail, then your verdict will be for the defendant, provided you find that defendant was entitled to sell said stocks upon the giving of such notice, and the failure of the plaintiff to comply with the demand of such notice." *Held*, no error. *Hixon* v. *Pixley*, 555

5. *Where the purchaser of an interest in a claim is aware of its being worked* by mining partners, he is put on notice of a partner's lien. *Duryea* v. *Burt*, 396

See PARTNERSHIP, 6, 23, 99, 113, 114; PATENT, 7.

NUGGET—See PARTNERSHIP, 28.

NUISANCE.

1. *Abatement—Obstructing water in mining gulch.*—The obstruction of water in a mining gulch, to the common injury of many miners working their possessory claims below, is a nuisance which such miners might abate in a peaceable manner, if they were first in the appropriation of the water for mining uses. *Stiles* v. *Laird*, 21

2. *Statute and common law not in conflict.*—The statute of California defining what are nuisances and prescribing a remedy by action, does not take away any common law remedy in the abatement of nuisances which the statute does not embrace. *Id.*

3. *Water for farm purposes polluted by mines.*—Where the lower proprietor had a right, by deed from the then upper proprietor, to erect a dam on the land of the latter, in order to convey a portion of the water through an artificial channel for the purpose of watering his meadows, but had actually used it for above twenty-one years for watering horses and cattle, it was *held* that such use for above twenty-one years entitled him to it, and that he might maintain suit against one claiming under the former upper proprietor for polluting the stream so as to render it unfit for his cattle. *Wheatley* v. *Chrisman*, 24

4. *Claim injured from ditch located prior thereto.*—Plaintiff sued for an injury done to his mining claim by the breaking of defendant's canal which was constructed prior to the location of plaintiff's claim; neither party claimed ownership of the soil, and no negligence in fact was shown. *Held*, that the rights of the parties were acquired at the dates of their respective locations, and that the rule of "coming to a nuisance" might be applied. *Tenney* v. *Miners' Ditch Co.*, 31

5. *Remedy in equity for diversion of water.*—Diversion of a watercourse is a private nuisance; and while no equitable remedy can be had for a mere past diversion, yet a continued diversion is such an irreparable injury as equity will redress. *Tuolumne Water Co.* v. *Chapman*, 34

6. *Damages, without injunction.*—Though A may be disentitled, by acquiescence, to an injunction to stop B's works, which are noxious to the neighborhood, yet it does not follow that B is entitled to an injunction to prevent A's recovering damage at law. Equity may leave both parties to their legal rights. *Bankart* v. *Houghton*, 37

7. *Enlargement of works originally erected with acquiescence.*—Acquiescence in the erection of noxious works while they produce little in-

NUISANCE. *Continued.*

jury does not warrant the subsequent extension of them to an extent productive of great damage. *Id.*

8. *Application of the rules above stated.*—Injunction to prevent (on the ground of acquiescence) a party injured by copper works from collection of a judgment in damages obtained at law for the injury, refused with costs. *Id.*

9. *Noxious vapors from smelting works.*—In an action for a nuisance to a messuage, dwelling house and premises caused by noxious vapors proceeding from smelting works upon land of the defendants, to which the defendants pleaded the general issue, the judge laid down the law to the jury that every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless by the lapse of a certain period of time he has acquired a prescriptive right to do so. *Tipping* v. *St. Helen's Co.*, 43

10. *Idem—But that the law does not regard trifling inconveniences.*—Everything must be looked at from a reasonable point of view; and therefore in an action for nuisance to property by noxious vapors arising on the land of another, the injury, to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That in determining that question, the time, locality and all the circumstances should be taken into consideration; that in counties where great works have been erected and carried on, which are the means of developing the national wealth, persons must not stand on extreme rights, and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in those places. And he directed them to find accordingly. *Held*, no misdirection. *Id.*

11. *Distinction between nuisance affecting the person and nuisance affecting property.*—There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place and the trades carried on around him; as to the former the same rule would not apply. *St. Helen's Co.* v. *Tipping*, 50

12. *Locality devoted to noisome trades.*—Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages, in respect of injury created by it to property in the neighborhood. *Id.*

13. *"Convenient" place.*—A place where the works of one person are carried on which occasion an actionable injury to the property of another, is not, within the meaning of the law, a "convenient" place. *Id.*

14. *Trifling inconvenience no nuisance.*—A bought an estate in a neighborhood where many manufacturing works were carried on. Among others there were the works of a copper smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapors from these works when they were in operation were proved to be injurious to the trees on A's estate. At the

NUISANCE. *Continued.*

trial the judge told the jury that unless by a prescriptive right, every man must so use his own property as not to injure that of his neighbor, but that the law did not regard trifling inconveniences; everything must be looked at from a reasonable point of view, and therefore in the case of an alleged injury to property, as from noxious vapors from a manufactory, the injury, to be actionable, must be such as visibly to diminish the value of the property; that locality and all other circumstances must be taken into consideration, and that in counties where great works have been and were carried on, parties must not stand on extreme rights: *Held*, that the direction was right. *Id.*

15. *Smelting works enjoined—Rule of "coming to a nuisance" not applied.*—H. sold land to persons who were described in the conveyances as copper smelters and co-partners, and as purchasing for the purposes of the partnership; and who, between the contract and conveyance, nearly completed smelting works on the lands. H. subsequently sold neighboring lands to the plaintiff, who bought with full notice of the existence of the copper works. The plaintiff recovered judgment at law, with substantial damages, for injury done to this land by the smoke of the works, and then filed his bill for an injunction. Wood, V. C., held that the plaintiff's having come to the nuisance did not disentitle him to equitable relief, and that H.'s having sold the site of the works with full knowledge that such works would be erected on it, did not disentitle him or those claiming under him to complain of any nuisance which the works might occasion. And his Honor granted an interlocutory injunction: *Held*, on appeal, that the injunction had been rightly granted. *Tipping* v. *St. Helen's Co.*, 57

16. *Polluting stream by coal mining—Sufficient cause of action.*—S. purchased a tract of land in the coal regions, upon which he erected a handsome residence. One of the principal inducements to the purchase was that a stream of pure mountain water ran through the tract, and a number of valuable improvements were made in order that the residence and grounds might be supplied with water for culinary, bathing and other purposes. Shortly after these improvements were completed, a mine was opened by defendant on the stream about two miles above, the water from which when pumped or flowing naturally therefrom, ran into the stream and so polluted it as to render the water unfit for any of the uses to which S. had adapted it. Upon the above facts the court below entered a nonsuit, on the ground that in the absence of negligence or malice this was *damnum absque injuria: Held*, that S. had a right of action, and the case should have been submitted to a jury. *Sanderson* v. *Penna. Coal Co.*, 60

17. *Idem—The exigencies, however, of the great industrial interests must be kept standing in view.*—The properties of large and useful interests should not be hampered or hindered for frivolous or trifling causes. For slight inconveniences or occasional annoyances they ought not to be held responsible, and in dealing with such complaints, juries should be held with a steady hand. *Id.*

18. *The owners of a water ditch are entitled to have the water flow therein in its natural state*, and when they claim such water by prior ap-

NUISANCE. *Continued.*

propriation, its corruption by any stranger is a private nuisance. *Crane v. Winsor*, 69

19. *Equitable interference.*—Equity will restrain the continuance of a private nuisance at the suit of the sufferer. *Id.*

20. *Pleading in such case.*—Complaint in case at bar commented on and held sufficient. *Id.*

21. *The keeping of a powder magazine* in a place where, in case of explosion, dwelling houses may be injured, may or may not amount to a private nuisance; that depends upon the locality, the quantity kept, and other circumstances. *Heeg v. Licht*, 74

22. *Keeping gunpowder, when a nuisance—Question for jury.*—In an action for injuries to plaintiff's buildings caused by the explosion of a powder magazine located near the buildings but beyond the territorial limits of a city, the court below charged the jury that they must find for the defendant, unless they found that the defendant carelessly and negligently kept the gunpowder upon his premises: *Held*, error. The fact that the magazine was liable to an explosion which could not be guarded against or averted by the greatest care, evinced its dangerous character, and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application. The question should have been left to the jury to determine whether under all the circumstances the defendant was chargeable with maintaining a private nuisance, and answerable for the damages arising from the explosion. *Id.*

23. *Custom of polluting streams.*—A coal company pumped from its mines water, which found its way into and polluted a previously pure stream. In an action against the company for damages, by a riparian owner of the stream, *held*, that the fact that coal mining is an important industry would not relieve the defendant from liability, and that it could not justify its action on the ground that the customary mode of disposing of water pumped from mines in the coal regions was to allow it to flow into the adjacent natural watercourses, as such usage lacked the necessary age to establish a general custom, and such a custom would not only be unreasonable but unlawful. *Penna. Coal Co. v. Sanderson*, 79

24. *Injunction against continuing injuries.*—Where a business complained of is a dangerous nuisance, and the injury is continuous and cumulative and the mischief irreparable, a court of equity will enjoin the prosecution of such business. *Penna. Lead Co.'s App.*, 84

25. *Idem—Lead smelting works.*—And if it appears that works for smelting lead are of such a character and the injury inflicted of such nature a court of equity will restrain their use. *Id.*

OCCUPATION.

1. *Occupation distinguished from possession.*—Any subjection of land to the dominion of a party, such as cultivation or other substantial use, is sufficient evidence of possession to enable an adverse claimant to maintain ejectment against him. Actual occupation in person, or by agent or servant, is not essential. *Quicksilver Co. v. Hicks*, 98

See POSSESSION, 1.

OIL.

1. *Property in oil as a fluid.*—Oil discovered in a well sunk by the owner of the land is his exclusive property, whether drawn from an underground *current* of oil or found standing; and the case is not analogous to the surface owner's right in running streams of water. *Hail* v. *Reed*, 103

2. *Oil extracted by a wrongdoer* out of the owner's well remains the property of the owner. *Id.*

3. *Oil barrels, what measure intended.*—A contract for so many barrels of a liquid is presumed to be made on the basis of the statutory number of gallons in a barrel; but where there is evidence that barrels of a different content were in contemplation of the parties, it is proper to leave the question to the jury. *Forsyth* v. *North Am. Oil Co.*, 115

4. *Oil sold by sample.*—The plaintiff agreed to deliver to defendant oil of a specified quality in payment of a judgment, and produced a sample in a bottle, which he assured the defendant was of the quality. A written agreement was then drawn for the delivery of "oil of the quality of the sample." Certain oil was delivered: *Held*, that the defendant might show that the oil was not of the quality the plaintiff agreed to deliver. *Maute* v. *Gross*, 123

5. *Idem—Fraud.*—The court charged that in a sale by sample, "where the adoption of a sample had been fraudulently procured, the party who has practiced such fraud should not complain if he is denied any advantage of his wrong:" *Held*, not to be error. *Id.*

6. *Repair of oil tank.*—A company leased a leaking oil tank, made with iron sides and a wooden bottom, the lessee agreeing, in lieu of rent, to put it "in perfectly good repair." This did not require more than putting it in as good condition as it could be made with a wooden bottom. *Ardesco Co.* v. *Richardson*, 131

7. *Oil is a mineral* and is included in the act of of 1850, relating to tenants in common of minerals, under the general term of "other minerals." The fact that oil was not then known as a product of land does not alter the matter. *Thompson* v. *Noble*. 137

8. *Tenants in common of oil in tank.*—Plaintiff and L. were tenants in common of an oil well; they filled a tank with oil equal in quantity to 2,400 barrels, of which 1,600 belonged to plaintiff, and 800 to L., and they agreed that the oil was not to be sold under $5 a barrel; they were not partners. L., without authority, contracted for the sale of all the oil in the tank at $1.25 per barrel: *Held*, on a bill against the purchaser, that L. had no right to sell the plaintiff's portion of the oil; that the defendant's removal of it would be wrongful; but that as the oil was a staple commodity which had not any peculiar value, and as there was no fiduciary relation between the plaintiff and L., the plaintiff was not entitled to an injunction, and that his only remedy was an action at law. *Mason* v. *Norris*, 140

9. "*Protection*" *to oil lease.*—Oil land described by metes and bounds with a "protection" of eight rods on the north side and ten rods on the east side, was leased to Evans: *Held*, that the "protection" extended to the point where the lines on the respective sides of the land would intersect. *Allison's App.*, 142

OIL. *Continued.*

10. *Injunction against operation on the protection.*—Oil land on the northeast corner of Evans' lease was let to Treat, who sank a well within the "protection," injuring Evans' well on his land: *Held*, that Treat could be restrained from operating on the "protection," and that in the same proceeding damages could be assessed against him for the injury. *Id.*

See ACCOUNT, 1; CONTRACT, 1–4; CONVERSION, 1; LEASE.

OPTION.

1. *Pre-emption agreement between partners, when waived.*—Where there is a privilege of pre-emption in a contract between mining partners, a subsequent sale, by consent, of a part interest of one partner, or a descent cast, will prevent the further operation of the covenant. *Weisman* v. *Smith*, 152

2. *Application of the rule to the facts.*—By agreement, Smith was to furnish funds to purchase certain plumbago lands and convey an interest to Weisman under a contract of partnership, one of the terms of which was that neither should convey without allowing his partner the refusal, or first privilege of purchase. After some years Weisman, with Smith's consent, sold half his interest in the mines to a third party. After one or more transfers, this third party's interest was represented by a company formed to work the mines. Weisman then filed a bill averring a tender under the refusal clause, and seeking a conveyance of the entire premises from the then various owners: *Held*, that it might be doubted whether the court would in any case decree a specific performance upon a contract tending to monopoly; but that the sale of an interest by consent to third parties without provision for the partner's right of pre-emption, justified the inference that such right of pre-emption was not further to be insisted upon. *Id.*

ORE.

1. *Discovery of copper after contract concerning partition of iron ores.*—Where tenants in common by agreement continued their tenancy in common, and arranged for the enjoyment of their respective rights in a certain manner of all the iron ore in certain deposits, their rights in copper or other more valuable ore subsequently discovered in the same tract would remain unchanged; or at least they would still be tenants in common therein. *Blewett* v. *Coleman*, 160

PARTIES.

1. *Interest necessary in plaintiff.*—In order to sustain a bill in chancery, it is necessary that the plaintiff should have an interest in the subject of that suit, or a right to the thing sought. *Gaston* v. *Plum*, 168

2. *Bill by owner of right to mine, brought after assignment.*—The grant of a right to mine is not of such a fiduciary capacity, or so personal in its character, or so uncertain in its nature, as to be incapable of assignment; therefore, where the grantee of such a right has assigned the same before bringing his bill he has no interest in the suit, and his bill must be dismissed. *Id.*

3. *Tenants in common may join in an action.*—Tenants in common in a mine, each owning undivided interests, acquired at different times,

PARTIES. *Continued.*

may sue jointly to recover possession of all of their several undivided interests. *Goller* v. *Fett*, 171

4. *Suit in partnership name dismissed.*—A motion to dismiss an appeal from an order refusing an injunction, because the appellants, "the proprietors of the Mexican Mill," are neither natural nor artificial persons, sustained, because they have no authority to prosecute under a copartnership name, and the proceeding is an absolute nullity. *Mexican Mill* v. *Yellow Jacket Co.*, 175

5. *No plaintiff, a fatal defect—No amendment.*—An objection that no person, either natural or artificial, is named as plaintiff, is not waived by failure to demur under section 40 of the Practice Act of Nevada, which provides that defendant may demur because there is a defect of parties plaintiff, or because the plaintiff has no legal capacity to sue; the defect is one which can not be cured by amendment; the objection may be taken at any time, and a motion to dismiss upon that ground will be sustained. *Id.*

6. *Non-joinder of parties as defense.*—G., a manager and part owner of a mining claim, sold to defendant certain ores extracted from the mine. In an action brought by G. for the price of the ore, defendant pleaded non-joinder of parties plaintiff, and alleging who were the true owners of the ore. On the trial defendant offered to show who were the real owners, whereupon the testimony was excluded. *Held*, that this ruling was error, and that defendant was entitled to sustain his plea of non-joinder by competent proof. *Goodspeed* v. *Wasatch Works*, 178

7. *Idem—Part owner can not recover alone.*—In the face of a plea of non-joinder neither a part owner as such, nor as manager, can recover alone for the price of ores sold. *Id.*

8. *A non-joinder of parties plaintiff* is a good ground of non-suit. *Id.*

9. *Parties to action to dissolve mining partnership.*—In an action to take an account of a mining partnership and dissolve the same, all those owning interests in the partnership are necessary parties. *Settembre* v. *Putnam*, 425

10. *Order to bring in other parties.*—If, in a case in equity to dissolve a mining partnership, it appears on the trial that a complete determination of the controversy can not be had without the presence of other parties, the court may, on its own motion, order them to be brought in before final decree. *Id.*

See PARTITION, 10; PARTNERSHIP, 11, 69, 76, 89; PATENT, 23.

PARTITION.

1. *Waiver of right to part.*—By contract the right to partition may be waived; affirming *Coleman* v. *Coleman*, 11 M. R. 183, and *Coleman* v. *Grubb*, 23 Pa. St. 393, previous controversies between the same parties. *Blewett* v. *Coleman*, 160

2. *Waiver of right to part.*—The right of partition is a beneficial incident of tenancies in common, but it may be waived by agreement of the parties in interest. *Coleman* v. *Coleman*, 183

3. *Agreement barring partition of Cornwall ore banks—Faults.*—In 1787, tenants in common of certain lands, furnaces and forges of irregu-

PARTITION. *Continued.*

lar deposits of iron ore unequally distributed over three contiguous hills, the deposits differing greatly in quantity and quality in the several places where they were worked, broken in continuity by faults, and showing indications of the possibility of concentrating as they descended from the different points open on the surface, by articles of agreement, jointly appointed arbitrators to make partition of all the lands except the "mine hills" containing these deposits. Upon a previous effort to make partition of all the land, the arbitrators had reported that no just and equal partition of these ore deposits could be made. Upon the report of the latter arbitrators under the agreement amicable actions of partition were entered, and the court decreed accordingly, parting all the lands except the Bingham tract with forty acres adjoining, and the Cornwall ore banks, of which it was decreed by the court that they do still remain undivided, to be held by the parties as tenants in common according to their respective shares, and to the covenants and articles in the said agreements. The said agreements had not only provided for partition of part of the land, but also that the ore banks not parted should remain together and undivided, and declaring it to be the intent of the agreement that neither of the parties should interrupt either of the other parties at any mine hole by them opened and occupied for the purpose of raising iron ore. Under this decree the original owners, their heirs and assigns, worked the mines until 1851. In that year partition was sought, but the Supreme Court *held*, that the partition made in 1787 by the agreement of the parties in interest, and decreed upon by the court, was binding on their successors in the title, not only because of the judgment of the court under which they claim, but because the covenants in the agreement of 1787 were real and ran with the land, though the words "heirs and assigns" were not used. Even if the covenants did not so run with the land as to give a right of action to an heir or alienee, they would serve to defeat this action for partition. The agreement of 1787 and the judicial proceedings had thereon constitute a bar to this action. *Id.*

4. *Partition not set aside as to single tract.*—The continuance of the mine hills in common after the covenants between the parties and the decree of the court became the consideration for submitting to the partition of the rest of the estate. The implied warranty which attends partition attached in this case; and if what was done as to the mine hills were to be overthrown, it would destroy the whole of the partition. If the rest of the estate be held in severalty by virtue of the partition, by virtue of the same proceeding the mine hills are to be held in common. *Id.*

5. *Covenant not to part.*—The words contained in said agreement "shall remain together and undivided as a tenancy in common," construed to mean a tenancy in common not for the present nor forever, but as long as the objects and purposes of the covenant in which they occur are in process of fulfillment, and so far they bar the action of partition. *Id.*

6. *Partition of ore bed refused.*—The court will not order partition of real estate held in common, where the value of the several parts can not be ascertained, as in the case of an ore bed. *Conant* v. *Smith*, 199

7. *Sale, when not decreed.*—Nor will they in such case order a *sale*

PARTITION. *Continued.*

thereof or an assignment to one of the parties, though authorized by the statute, if equal or better justice can be obtained in another way; the proper remedy of the party aggrieved is by application to the court of chancery. *Id.*

8. *Costs in partition* under the statute can not be recovered where there is no question as to the title of the respective parties. *Id.*

9. *The Supreme Court* has common law jurisdiction to part real estate. *Canfield* v. *Ford*, 201

10. *The common grantor of tenants in common* is not a necessary party in a partition suit and has no interest whatever therein. *Id.*

11. *Colliery worked in partnership.*—On bill to wind up a partnership, the court will not order a partition of mines worked as firm assets, but will order a sale of the entirety, and in this case liberty to the partners severally to bid was allowed. *Wild* v. *Milne*, 207

12. *Partition of water impracticable—Sale and distribution.*—It is utterly impracticable for the court to make a mechanical division of the water running in a ditch, owned by tenants in common and used for mining purposes, in such a manner as to permanently do justice between the parties. The only partition that the court can make, which will definitely and permanently end the dispute of the parties and do justice between them, is to order a sale and distribute the proceeds. *McGillivray* v *Evans*, 209

13. *Partition a matter of right.*—As the law deems it against good morals to *compel* joint owners to hold a thing in common, a decree of partition may always be insisted on as an absolute right. It is not necessarily founded upon any misconduct of the co-tenants or part owners, but is in obedience to the call of the parties who have a right to the partition. *Dall* v. *Confidence Co.*, 214

14. *Partition first—Sale as an alternative.*—In a suit for partition a sale of the property should never be decreed except when a partition would result in great prejudice to the respective owners, and under the Nevada statutes if any one of the tenants in common files an affidavit that a sale for cash would be injurious to him, it is the duty of the court to appoint a commissioner to divide the property, and it is error to decree a sale. *Id.*

15. *Practice.*—A sworn answer setting up the same matter as required by statute in the affidavit, is equivalent to it. *Id.*

16. *No compensation for incidentally enhancing value.*—The defendant, in a suit between tenants in common for the partition of twenty-five feet of a mining claim, will not be allowed compensation for developments done upon an adjoining claim which have incidentally enhanced the value of the premises of which partition is sought. *Id.*

17. *Equity jurisdiction of Federal courts not controlled by State statutes.*—The equity jurisdiction of the Circuit Courts of the United States is derived from and defined by the constitution and laws of the United States, is the same in all the States, and is not affected or varied by the statutes of the States regulating and defining the chancery powers and jurisdiction of the State courts. *Strettell* v. *Ballou*, 220

18. *Partition of possessory mining claim.*—The holder of a mere

PARTITION. *Continued.*

possessory interest in land, not having title thereto, can not maintain a bill for partition in the Circuit Courts of the United States. Such a bill must be filed by one having title to a portion of the premises sought to be partitioned. If a statute of the State authorizes such bill, it must be filed in the State courts. *Id.*

19. *Partition of ditch—Mortgage—Account.*—A mortgage upon an undivided interest in a ditch may be adjusted in a suit for partition of the ditch, and an account of the water rents taken. *Bradley* v. *Harkness*, 389

20. *Partition not incident to account.*—Partition may be made by consent; but it is not an incident to a suit for a partnership accounting in which the partners usually have a right to have the assets disposed of. If land belonging to the firm is not disposed of, it must be left as a distinct tenancy in common so that the tenants may have it partitioned in a separate suit. *Godfrey* v. *White*, 562

21. *Partition affected by lex loci.*—Partition is a local proceeding, and can only be enforced in a court which has jurisdiction of the territory where the land is. *Id.*

22. *Parol partition.*—A parol partition of a mining claim, if followed by exclusive possession of the several parcels, is doubtless valid; the parties cease to be tenants in common, and forever after deal at arm's length. All relation of trust and confidence ceases. *420 M. Co.* v. *Bullion Co.*, 608

See ACCOUNT, 3; MINERALS, 1; ORE, 1; PARTNERSHIP, 54.

PARTNERSHIP.

1. *General rule as to dissolution.*—When no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. *Crawshay* v. *Maule*, 223

2. *Death* terminates a partnership. *Id.*

3. *The purchase of a leasehold* interest as part of a stock in trade is not evidence of an agreement of partnership commensurate with the duration of the lease. *Id.*

4. *Trading concern—Mines and iron works* operated in connection therewith are not a mere interest in land, but a partnership in trade. *Id.*

5. *Upon final dissolution of a trading partnership* the court will order a sale on motion, *Id.*

6. *Continuing liability of partner after conditional notice.*—The defendant, a part owner in a mine, told the plaintiff, who had supplied the mine on the credit of the firm, that he had sold his share to A and B, who for the future would be his paymasters, and that he, the defendant, would be no longer responsible. He had not in fact sold, but had made an executory contract for sale, which was not consummated. Plaintiff kept on furnishing goods to the mine. *Held*, that a partner may by absolute notice save his liability although he still continues a partner; but that this was not an absolute notice in terms, and its effect should have been left to the jury. *Vice* v. *Fleming*, 241

PARTNERSHIP. *Continued.*

7. *Holder of share not ipso facto liable.*—Where, in an action for goods supplied for the purpose of working a mine, it appeared that the defendant had paid money for certain shares and received a certificate that she was a proprietor of those shares, and that she had acknowledged that she was a shareholder, but no assignment of any interest in the mine had been made to her: *Held* that the action could not be maintained. *Vice* v. *Lady Anson*, 244

8. *All property of a trading concern*, whether real or personal, is partnership assets, and is to be first applied in satisfaction of the partnership demands. *Fereday* v. *Wightwick*, 247

9. *Incidents of mining partnerships.*—A mining concern differs from a common partnership in that—1. The shares are assignable. 2. The death or bankruptcy of a holder of shares does not operate as a dissolution although it is in the nature of a trading concern. *Id.*

10. *Clandestine bonus to partner.*—A person employed, on behalf of himself and his copartners, in negotiating the terms of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of £12,000 was paid in pursuance of such stipulation, the party receiving it was declared to hold it in trust for the partnership. *Fawcett* v. *Whitehouse*, 250

11. *Retiring and incoming partners as parties.*—Before the transaction was discovered one of the partners withdrew, and subsequently another partner assigned a share in the stock and in his proportion of this claim to persons then admitted into the concern. *Held*, that the retiring, the continuing and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared. *Id.*

12. *Burning lime on shares.*—Where two persons agreed to burn lime on shares, one to fill a kiln with stone and the other to burn the kiln and furnish the necessary wood for the purpose, the lime to be equally divided between them, it was *held*, that a technical partnership existed between the parties. *Musier* v. *Trumpbour*, 260

13. *Suit at law between partners.*—Notwithstanding the partnership, an action at law may be maintained by one partner against the other for a balance due him growing out of the partnership transaction, if there be but a single item to liquidate. *Id.*

14. *Liability of withdrawing partner—Notice.*—S. and others carried on business under the name of the "Plas Madoc Colliery Company." S. withdrew from the firm, which afterward became indebted to C., no notice having been given to C. or the public of S.'s withdrawing. *Held*, that S. was not liable for the debt, there being no sufficient evidence that he had ever, while a partner, represented himself as such to C., or appeared so publicly in that character that C. must have been presumed to know it. *Carter* v. *Whalley*, 262

15. *Use of unusual firm name in signing note.*—Where a partner, accustomed to issue notes on behalf of the firm, indorses a particular note in a name differing from that of the partnership, and not previously used by them, which note is objected to on that account in an action brought upon it by the indorsee, the proper question for the jury is, whether the name used, though inaccurate, substantially describes the firm, or whether it so

PARTNERSHIP. *Continued.*

far varies that the indorser must be taken to have issued the note on his own account, and not in the exercise of his general authority as partner. *Faith* v. *Richmond*, 265

16. *Idem—Facts of the case.*—So held where a partner in "The Newcastle and Sunderland Wall's End Coal Company" drew a note in the name of "The Newcastle Coal Company," and made it payable at a bank where the first mentioned company had no account. *Id.*

17. *Evidence to prove partnership liability.*—Where a mining company was formed on a capital of £50,000, in 3,000 shares, and 2,000 shares only were actually subscribed for, of which the defendant took 100: *Held*, that letters subsequently written by him to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to show that he authorized the directors to proceed in the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied to the mines on the order of the directors. *Tredwen* v. *Bourne*, 268

18. *The members of a mining company have authority* by law (in the absence of any proof of a more limited authority) to bind each other by dealings on credit for the purpose of working the mines, if that appears to be necessary or usual in the management of mines. *Id.*

19. *Admissions in proof of partnership.*—When a defendant is charged in debt as a member of a mining company, but is not shown to have contracted such debt personally, nor to have represented himself to the plaintiff as a partner, the fact of his having been partner may nevertheless be shown by evidence, short of strict proof that he signed the deed of partnership or was legally interested in the mine. Admissions made by him before or after the debt was incurred may be evidence for this purpose. *Ralph* v. *Harvey*, 273

20. *Suit on company note by holder of company scrip.*—A plaintiff who is a holder of scrip, but not a registered shareholder in a mining company, has but an inchoate right of partnership in the company, and not a perfect right, and is not thereby disqualified from bringing suit upon a note of the company. *Fox* v. *Frith*, 277

21. *Managing adventurer no power to borrow on firm credit.*—One of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body for money borrowed for the concern. And the fact of his having the general management of the mine makes no difference, in the absence of circumstances from which an implied authority for that purpose can be inferred. *Ricketts* v. *Bennett*, 278

22. *General power of partner—Dormant partners.*—Each member of a mining copartnership has power to bind the company by any contract within the scope of the partnership, and is a general agent of his copartners for such purpose. The fact that some of the partners were dormant, or the fact of their subsequent dissent, does not affect the joint liability. *Burgan* v. *Lyell*, 287

23. *Restrictions inter sese.*—A special limitation of the powers of the partners contained in the articles of copartnership does not affect the power of each partner to contract and bind his copartner, except as against parties having notice of such limitation. *Id.*

PARTNERSHIP. *Continued.*

24. *Silent dissolution as affecting liability.*—A dissolution by one of the partners silently withdrawing or assigning his stock to another, can not relieve such partner from liability for work done before, or debts contracted after thus silently withdrawing or assigning. *Id.*

25. *Prospecting contract—Gold dust—Distinction between "profits" and "returns."*—A prospecting party, organized in Rhode Island to mine in California, took ship, but dissolved by common consent before they reached port, divided the outfit among them, and resolved that each would work for the man who had sent him, but that they would not operate under any company organization. Hawkins was the party who had outfitted one Andrews. Andrews proceeded to mine and remitted to Hawkins 18 oz. of gold dust. In the meantime Hawkins had sold and guaranteed to plaintiffs a fourth interest in the "profits" of the adventure, and he now refused to divide the gold dust. *Held*, that this gold dust was merely a payment on account of an equity between Hawkins and Andrews, but that, as the arrangement out of which Hawkins had guaranteed plaintiffs an interest in the "profits" had dissolved and had never realized any "profits," that there was no liability or accounting due from the defendant, Hawkins, to the plaintiffs. *Fletcher* v. *Hawkins*, 290

26. *Want of co-operation by partner distinguished from interference—Receiver—Dissolution.*—Where tenants in common of a mine have been working it in partnership, or where the mine itself is the partnership property, the court will not appoint a receiver or manager at the instance of one of the partners, in a suit which does not seek to dissolve the partnership. Nor, even in a suit to dissolve the partnership, will the court appoint a receiver on an interlocutory application, merely upon evidence that the partners do not co-operate in the management of the business; but to sustain such an application it must be shown that one partner has interfered so as to prevent the business being carried on. *Roberts* v. *Eberhardt*, 301

27. *Powers of managing partner.*—A managing partner of a mine has authority to defray all the necessary and proper expenses incidental to the beneficial working of the mine out of the joint profits derived from the sale of the minerals. *Id.*

28. *Mine worked on family arrangement—Admission of partner against partner—Division of nugget.*—John Reid was the owner of a gold mine. His sons and sons-in-law agreed to work it, paying him one third, and dividing the residue equally among those who worked on the several days. Any one not working was at liberty to furnish one of his white family as a hand. The plaintiff sent his son on a certain date in his place. On this same day a nugget of gold weighing over nine pounds was found. The others then denied that the son had been accepted as a hand. It appeared that he had commenced work and then been sent for a dipper, and while absent one of the partners had made a remark in the nature of a concession that he was a hand, etc. *Held*, that this admission was evidence against all the partners; and that the plaintiff was entitled to his share in the proceeds of that day's labor, he having been thus represented by his son. *Reid* v. *Barnhart*, 312

29. *Accounting sought by deserting and insolvent adventurers.*—

PARTNERSHIP. *Continued.*

Rhea, Vannoy, Garland and McKay, entered into a written agreement for the purchase of lands, and to work them by mining, etc., as partners. One of the specifications was that such disposition was to be made of the property as a majority might deem advisable. Lots were purchased under statutory sales, the legal title, however, remaining in the State. After outlays made, it appeared that the land would not pay for mining. Two of the partners who were wholly insolvent deserted the adventure; a third, who was at least partially insolvent, went to Georgia, "where he thought the prospects of finding gold were more flattering." Vannoy being left as the only partner adhering to the adventure, to relieve his sureties and save further liability for unpaid purchase money, disposed of the land for the best price obtainable. *Held*, that the abandonment by three out of the four partners superseded any contract for a concurrence of the majority. 2, That neither of the abandoning partners had any equity against Vannoy's disposition of the property, especially as against a purchaser at a fair rate without notice of any equity. *Rhea* v. *Vannoy*, 315

30. *Limitation of the account.*—All that such abandoning partners could ask under such circumstances would be an account of the moneys received on the disposition of the land, and for any tolls, rents or profits arising out of the mining or other operations of the adventure. *Id.*

31. *Abandoned partner operating on his own account.*—A, B, C and D entered into a copartnership to purchase a tract of land at the Cherokee sales, and to work the same for gold. A and B only gave bonds for the purchase money, with sureties whom they procured. All except A left the country, abandoned the work for several years and gave him no aid, but suffered him to be pressed for the money. A, in good faith, to relieve his sureties, surrendered his land to the State, and afterward, under another act, purchased a pre-emption to the same tract which he sold for a sum of money. *Held*, that neither the original partners nor their assigns could hold A to account for this money. *Rhea* v. *Tathem*, 321

32. *Partnership of mining concern with merchant.*—Where a mining company, not incorporate, forms a trading partnership with an individual under a firm name, each member of the mining company is a member of the firm. *Rich* v. *Davis*, 326

33. *Salesman not a dormant partner.*—Where one of the mining company acted as salesman of the firm, it can not be pretended that he was a dormant partner whose acts would not bind the firm. *Id.*

34. *Construction of agreement to borrow capital upon firm credit.*—Where articles of copartnership provided for certain advancements to be made by each partner, "after which it is understood that should it be necessary to obtain more money for the completion of the works such money is to be raised between us on our joint note, or otherwise," the true construction of the agreement is, that after each partner had advanced the sums stipulated in the agreement, any further money required was to be raised by the joint efforts and upon the joint credit of the partners. *Patterson* v. *Silliman*, 327

35. *Forfeiture of share—Burden of proof on forfeitor although defendant.*—Where an agreement of copartnership provided that the party

PARTNERSHIP. *Continued.*

violating the stipulations of the agreement should forfeit his interest in the concern, and at the option of the other partner might be ejected therefrom, by such other partner refunding to him the money advanced to expend in the same, it was *held:* 1, That it lies upon the partner claiming a right to forfeit the interest of his copartner, to prove fully and clearly that a cause of forfeiture had arisen. 2, That the *onus probandi* will lie upon the party asserting and claiming the forfeiture, although he be respondent to a bill in equity in which the complainant avers performance on his part and ejection by the other without cause. *Id.*

36. *Note of sundry partners for benefit of all—Contribution.*—Three of the partners in a mining company borrow money on their joint note and the money is used for the benefit of the concern. Two of them paid the note and one of them, who had advanced the share of the third maker sued such third maker for contribution. *Held*, that it was a transaction independent of the mining partnership, and that the action at law was maintainable. *Sedgwick* v. *Daniell*, 337

37. *Bias, against interest.*—No partner who owes a duty toward another can place himself in a situation which gives him a bias against the discharge of that duty. *Burton* v. *Wookey*, 342

38. *Charging intermediate profit against associate.*—A partner may not buy by barter for, and charge cash against, his firm. *Id.*

39. *Power of managing partners to borrow and to accept bills.*—The four defendants were partners in coal mining. Two of them conducted the business of the colliery. These managing partners borrowed money and accepted a bill of exchange in the name of the firm in settlement of firm debts on which actions had been brought. The partnership deed contained a clause that if any partner should, *for his own use*, accept any bill of exchange, the others might determine his interest in the partnership. *Held*, that the managing partners had power to borrow the money and to bind the firm to the payment of the accepted bill. *Brown* v. *Kidger*, 343

40. *Joint stock company governed by partnership law.*—Where there is nothing in the constitution of a joint stock company which regulates the remedies of the shareholders as between themselves, the general law of partnership must govern. *Bullard* v. *Kinney*, 348

41. *Partner can not sue partner.*—Where two shareholders in a mining concern sold to the company goods, and afterward, during the existence of the company, sold their stock to A, and assigned their account for goods to B, who sued the company by attachment: *Held*, that such action could not be maintained, there having been no final settlement, no balance struck and no express promise on the part of the individual parties to pay their ascertained proportion. *Id.*

42. *Reasons for the rule* forbidding suit by partner against partner except in certain restricted cases. *Id.*

43. *Action between shareholders in ditch.*—The defendants collected the rents for the use of water from a ditch which they owned as tenants in common with the plaintiff. *Held*, that the shareholders in the ditch may be regarded as partners entitled to participate in the profits derived

PARTNERSHIP. *Continued.*

from the business of carrying on the ditch, and the money used be considered as money had and received by defendants to the plaintiff's use. *Abel* v. *Love*, 350

44. *Partner may bid at sale of partner's interest.*—There is no rule of law preventing, under ordinary circumstances, a partner from purchasing the interest of his copartner when exposed to public sale. *Bradbury* v. *Barnes*, 354

45. *No fiduciary relation in such case.*—The rule controlling action of trustee toward his beneficiary does not apply against such purchase. *Id.*

46. *Facts taking case out of the general rule.*—But where, while he has in his hands large funds of the company, he causes to be bought in, in the name of third parties, judgments against the company or a tax title, he will be presumed to have so bought to protect the company, and his associates are bound to him in contribution only. *Id.*

47. *Lessee, taking partner, allowed to dissolve at will after accounting.*—Plaintiff, being the lessee of certain coal seams, worked the upper seams under a partnership arrangement with defendant; and the upper seams becoming worked out, defendant proceeded with plaintiff's sanction to sink a pit to seams lying below, for which work money was borrowed on the firm credit and the expenses were paid and the loan refunded out of partnership funds. When the new pit was finished disputes arose and plaintiff gave notice of dissolution. Defendant insisted that the partnership was to continue during the entire l ase, which plaintiff denied. *Held*, that the burden of proving that m re than a partnership at will existed rested upon the defendant, and that in the absence of such proof the plaintiff was entitled to dissolve at pleasure, and that defendant could claim no interest in the seams of coal, but that an accounting had been rightly directed in respect to expenditures already made in sinking the new pit. *Burdon* v. *Barkus*, 357

48. *Liability of general partners for trespass of employes.*—Partners are liable for a trespass by themselves or their agents, employes or servants in the legitimate conduct of the partnership business; or if the trespass be done by their agents or workmen acting within the scope of their authority, or while in the employment of the firm. *McKnight* v. *Ratcliff*, 364

49. *A special partner is not so liable* (under limited partnership act); facts considered not sufficient to change a special into a general partner. *Id.*

50. *Where the several owners of a mine co-operate to work it*, they form a mining partnership. *Skillman* v. *Lachman*, 381

51. *A mining partnership differs* from an ordinary partnership, in certain incidents, to wit: *inter alia* (1) the sale of his interest by one partner does not dissolve the relation; (2) no one partner can bind the company by note or contract of indebtedness in the name of the company. *Id.*

52. *The power to purchase materials* for the use of the mine does not imply the power to execute a note bearing interest. *Id.*

53. *Distinction between partnership and tenancy in common.*—A partnership is the creature of contract; a tenancy in common results as an op-

PARTNERSHIP. *Continued.*

eration of law. With partnership, a new incoming party dissolves the firm relation. Tenants in common may buy in or sell out at pleasure. *Bradley* v. *Harkness*, 389

54. *Idem—Desire to part.*—The mere desire of one of the co-tenants is sufficient to authorize the courts to grant a dissolution; that is not enough between partners. *Id.*

55. *Partnership not created by purchase.*—The averment of a purchase of an undivided interest in a ditch does not imply a partnership. *Id.*

56. *Mine owners working claim together.*—If the owners of mining ground purchase adjoining ground and pay for it out of a common fund, and work the common property, sharing the profits and loss of the enterprise in accordance with their respective interests, the elements of a partnership exist among the different owners, although there is no express stipulation between them to share the profits and losses. *Duryea* v. *Burt*, 395

57. *Mining and ordinary partnerships distinguished.*—Mining partnerships are distinguished from ordinary trading partnerships in not being founded on the *delectus personæ*, from which principle the rights and obligations of ordinary trading partnerships are derived. *Id.*

58. *Assignment no dissolution.*—One of the peculiar rules attaching to mining partnerships is that one person may convey his interest in the mine and business without dissolving the partnership. *Id.*

59. *Net profits defined.*—Net profits, properly so called, are to be ascertained by putting a value on all the assets of the company of whatever nature, and deducting therefrom all liabilities, including among such liabilities the amount of the contributed capital, the surplus then remaining being net profits. *Binney* v. *Ince Hall Co.*, 410

60. *Distribution of profits set apart as continuing capital.*—Circumstances considered under which net profits may, at the wish of the majority of shareholders, be applied in repayment of contributed capital, although the deed of settlement seems to contemplate a continuing capital, as in an ordinary partnership; there being, however, no express prohibition in the deed. *Id.*

61. *Partner holding lease with privilege of renewal.*—Where two entered into partnership to continue for three years, and so much longer as one of them, holding a certain lease of stone quarries, should continue lessee of such quarries: *Held*, that the partner holding such lease was not bound to exercise the option of renewal which such lease gave him, and that the partnership expired with the lease. *Phillips* v. *Reeder*, 419

62. *If articles of copartnership provide for its continuance during the existence of a lease*, renewable at the option of one of the partners, it is at the option of such partner to continue the partnership by renewing the lease, or to end it by refusing to renew. He has a right to refuse to renew—for the purpose of ending the partnership. *Id.*

63. *Division of property after dissolution.*—Upon the dissolution of a partnership, in which the articles provided that the effects, on dissolution, were to be equally divided among the partners, the property and effects of the firm belong to the individuals who composed it, as tenants in com-

PARTNERSHIP. *Continued.*

mon; part of the former members of the firm can not dispose of the property of any other member, without his consent. *Id.*

64. *Idem.*—If some of the members of a dissolved partnership dispose of the property of one of the partners, without his consent, he may, at his option, call on them to account for its value. *Id.*

65. *Rights of retiring partner.*—In many cases, if some of the partners, after dissolution, continue the business with the property of the late firm, the retiring partner will be entitled to call on them for a share of the profits, as well as for his capital. *Id.*

66. *Idem—Continued use of retiring partner's effects.*—But this principle will not be applied to a case where the chief contribution to the business was personal skill and labor, and a new partnership was formed with strangers, merely because some of the property of the retiring partner was used in the new business, after being sold to the new firm by the continuing partners, without authority. *Id.*

67. *Idem—Accounting to retired partner.*—A majority of the partners of a firm that is dissolved have no right, without judicial proceedings, to compel another partner to sell or divide the property, or to choose an appraiser for the purpose of valuation, or, if he refuses, to choose appraisers themselves, and purchase or sell his share at such valuation. But if th y have appropriated or sold the property they must account to him for the real value of his share and interest therein. *Id.*

68. *Mine purchased by partner in trust for copartners.*—If two or more persons, as mining partners, develop a mine situated upon land owned by a third person, and they authorized one of their number to purchase the land of the owner for the benefit of all, and he buys the same in his own name, he holds the legal title of his partners' proportion in the mine in trust for them. *Settembre* v. *Putnam*, 425

69. *Parties to action between mining partners.*—Where two of three partners in a mine make a contract with a p rson not interested in the same, by which he becomes entitled to a share of their interest, and a like share of the profits of their interest, the two are the only necessary parties defendant in an action brought by the person they contract with to determine his right to a share in the mine and profits. *Id.*

70. *Partnership relation of owners in ditch companies.*—Unincorporated ditch companies, organized for the sale of water, the stock in which is bought and sold at the pleasure of the owners, without consulting the co-owners, differ from ordinary commercial partnerships. Some of the incidents of a partnership pertain to such companies, and some of mere tenancies in common likewise pertain to them. *McConnell* v. *Denver*, 432

71. *Restricted power of member of ditch company.*—A member of such a company has no general authority, by virtue of such membership, to bind the company by his contracts. *Id.*

72. *Power of superintendent of ditch company.*—The superintendent or managing agent of such company has no authority to bind the company by a note, given for materials used by the company, unless the authority to give such note is expressly conferred upon him by the company, or may be implied from his acts recognized by the company, with full knowledge. *Id.*

PARTNERSHIP. *Continued.*

73. *One partner may at any time withdraw* and cause a technical dissolution of the firm, subject to liability to his partners if the act be wrongful. *Slemmer's App.*, 437

74. *Cause of dissolution—Discretion.*—In a suit in which the prayer of the plaintiff was for a dissolution of the partnership existing between himself and defendants, and for an appraisement and conveyance of the firm effects, etc.: *Held*, that a wide discretion is vested in courts of equity upon questions relating to the dissolution of partnerships, but when irreconcilable differences exist, which preclude harmonious and successful operation of the business by the partners, a court of equity will decree a dissolution. *Id.*

75. *Idem—Preservation of the business.*—In making such a decree the court will consider not merely the terms of the express contract between the partners, but also the duties and obligations implied in every partnership contract. Where a valuable business has grown up by the labors and contributions of all, the court should be careful to preserve it, and put all the partners on a fair and equal footing to compete for it. To appoint a receiver, direct a sale of the whole, and a winding up of the business, would destroy its value without benefiting either party. *Id.*

76. *Liability of incoming partner.*—An incoming partner is not liable on the contracts and engagements of the firm entered into before he became a member of it. *Babcock* v. *Stewart*, 447

77. *Liability personal to the debtor.*—Those who have sold goods or done work on the credit of the original partners and have no lien, have parted with all their interest in the effects, and can look only personally to those with whom they have contracted. *Id.*

78. *The ground of liability of one partner for the acts of the others* is that of an implied general agency within the scope of the partnership. *Id.*

79. *Special partners.*—In a suit against two as partners on contract, the question would be whether they were partners in that contract. Whether they were general partners is immaterial. *Kirk* v. *Hartman*, 450

80. *Holding out as partner.*—If one holds himself out, or knowingly suffers himself to be held out, as a partner, on the faith of which others trust or enter into a contract with the firm, he is responsible, although not a partner. *Id.*

81. *Evidence of the partnership relation.*—An application for shares and a payment of the first deposit in a joint stock oil company, does not constitute one a partner, where he has not interfered with the concern; nor is the insertion of his name by the secretary in a book of the company, containing a list of the members, a holding of him out to the public as a partner; but if he act as a member or director, attend meetings, or otherwise give himself out as a member, he will make himself liable, though there may be some want of the necessary formalities or acts to make him legally a member. *Hedge's App.*, 463

82. *Subscription to stock does not create partnership.*—A partnership is founded in a voluntary contract of the parties, as distinguished from a mere community of interest. A subscription to shares is but a declaration

PARTNERSHIP. *Continued.*

of the intention to become a partner, and is executory only. If the subscriber never takes any further part in the organization of the company, and never acts with it, he is not a partner. *Id.*

83. *The meeting of some of the subscribers* to organize their company and enter into the actual relation of members to it, binds none but those who meet. *Id.*

84. *Assessments of mining interests.*—The statute of 1865–6, in relation to levying assessments against the owners of interests in mining claims for the purpose of working the same, applies only to copartners in the claim, and has no reference to those who are mere owners and shareholders, without the partnership relation. *Brundage* v. *Adams*, 470

85. *Idem.*—To warrant such assessment, if the partnership relation does not exist, the joint owner must be notified that thenceforward he will be deemed a copartner for the purpose of working the claim, and the service of the notice changes the relationship of the parties, and creates a mining partnership. *Id.*

86. *Constitutionality of Cal. Partnership Act.*—The question of the constitutionality of the act providing for forced sale of partnership interests without contract or judicial process, suggested by the court but not considered. *Id.*

87. *Power of superintendent to bind partnership.*—A superintendent of a mining partnership has no authority, as superintendent, to purchase ditch property for the purpose of supplying the company with water to work their claims, or to give the company's note in payment. There must have been special authority for that purpose, or his acts must have been afterward ratified, otherwise the partnership will not be bound. *Jones* v. *Clark*, 473

88. *Acts of superintendent afterward ratified—Estoppel.*—A promissory note given by the superintendent of a mining partnership, in payment for property purchased by him in the name of the company and for its use, will be held to be ratified by the company, although not authorized at a company meeting, if the partnership afterward uses the property so purchased and acquiesces in the payment by the company of the interest upon the note, until after the debt would be barred if the note were held invalid. By such conduct the company is estopped from disputing the validity of the note. *Id.*

89. *Parties—Retired partner.*—In a suit to dissolve a partnership and for an accounting, and to have a note held by the plaintiff paid out of the partnership assets, if a retired partner still continues bound by the note, he has nevertheless parted with his equity to have the partnership debts paid out of the partnership property, and if a proper, is certainly not a necessary party to the proceeding. *Id.*

90. *Survivorship.*—A mining partnership is not dissolved by the death of one of the partners; and the survivor has no right to take control of the property. Such a rule only applies where the *delectus personæ* exists. *Id.*

91. *No delectus personæ in mining partnerships.*—It is well established that in mining partnerships there is usually no *delectus personæ*, and because of this peculiarity the partnership is not dissolved by the death

PARTNERSHIP. *Continued.*

of a partner, nor as a consequence of a sale of an interest by a partner to a stranger. *Taylor* v. *Castle*, 484

92. *Purchaser becomes presumptively partner.*—One who purchases an interest in mining claims owned by mining partners presumptively becomes one of the partners, though he takes no part in the management of the partnership affairs, and never holds himself out to the world as a partner. *Id.*

93. *Usage of the firm—Mode of contracting.*—Where a contract in writing, by which the plaintiff bound himself to erect a mill for defendants, purported to have been made by a mining partnership in its firm name through its secretary, and it appeared that such contract had been authorized by a vote of a majority of the shares at a meeting of the company, and after being signed by the secretary had been ratified and approved in the same manner, and it further appeared that though there were no written regulations or by-laws the company usually did business in this way: *Held*, that the recognized and established usage on the part of the firm should be taken as a part of the contract of partnership. *Id.*

94. *Suit by partner upon note of copartner.*—C., B. and S., with others, composed a joint stock association, unincorporated, and known as the Oil Creek Petroleum Company. B. and S. were the active managers of the association, and, for the purpose of raising money to pay off certain company indebtedness, B. executed a promissory note to the order of S., which S. indorsed and which was discounted by a bank in New Jersey, and upon its maturity was paid by C., to whom it was transferred. C. then brought suit against B. upon the note. *Held*, that the note was not a partnership note, and the fact that the money raised upon it was applied to the payment of debts of the association, presented no obstacle to the suit by C. *Crater* v. *Bininger*, 487

95. *Partner against partner upon segregated item of demand.*—An action by one partner will lie against his copartner, if the contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts. *Id.*

96. *Partnership note—Strict partnership by agreement between mining partners.*—Howell and Haynes entered into an agreement to engage together in a mining adventure, under the firm name of "Howell & Haynes," the profits and losses to be shared equally, etc., etc. Howell borrowed of the plaintiff in the name of the firm and for its use the money for which the note in suit was given. *Held*, that while in case of an ordinary mining partnership one partner has no authority to bind the other by a firm note, yet there is nothing in the nature of the business of mining which forbids a contract of strict partnership subject to the incidents of a trading partnership, and that the contract in this case constituted a partnership in the ordinary sense, so that both Howell and Haynes were bound by the note. *Decker* v. *Howell*, 492

97. *Legal title to common fund in third parties.*—Where property belongs in equity to an association of members, each having an undivided interest in whatever belongs to the company, it is of no consequence in a controversy over the distribution of the proceeds of the sale of the prop-

PARTNERSHIP. *Continued.*

erty authorized by the general consent, that the legal title stood in a third person. *Butterfield* v. *Beardsley*, 495

98. *Distribution of proceeds of sale of entire stock—Equity jurisdiction.*—Where the property of a joint stock association, unincorporated, has been disposed of on the basis of the payment, by the holder of a portion of the shares of such company, of a certain sum on account of the entire interest of all the other shareholders, in such a manner as to extinguish all claim on his part upon the sum so paid, in a suit between the residue of the shareholders for an equal distribution of the proceeds of sale, his former interest in the company will have no bearing on the result. The sale will not be regarded as merely a transfer of individual certificates of stock, but as a final disposition of the entire assets of the company, and the case will be held to be one for equitable cognizance. *Id.*

99. *Private arrangement between partners.*—The rule that third parties are not affected by private agreement existing between partners without notice thereof, rests upon the custom of merchants alone, and has no application to non-commercial partnerships. *Judge* v. *Braswell*, 508

100. *Proof of authority of member to contract.*—In non-commercial partnership one who seeks to hold the firm bound upon a contract made by a single member must be able to show either express authority or that such is the custom or usage of that particular branch of business in which the firm is engaged, or such facts as will warrant the implication of authority from his copartners. *Id.*

101. *Burden of proof of authority to bind firm.*—In such case the burden of proof as to authority to bind the firm, lies affirmatively upon the plaintiff to show such authority. *Id.*

102. *Mining, a non-commercial partnership.*—The above rules applied to a company organized to buy and work mines, as belonging to the class of non-commercial partnerships. *Id.*

103. *Partners buying in adverse claim and refusing benefit thereof to associate.*—The three associates in a prospecting adventure discovered the Silver Girdle lode. It was recorded in the names of two of them. Afterward certain strangers located over the same ground the Burlington lode. These strangers conveyed the conflict to the same parties in whose name was the first location. *Held*, that the party for whom one third of the original title was held by his associates was entitled to his share of the benefit of the purchase. *Hirbour* v. *Reeding*, 514

104. *Quarry works prosecuted—Successive parties in interest—Partnership continued by acquiescence of heirs—Necessity of demand to dissolve before suit.*—Sundry persons, tenants in common of quarries, formed a partnership, in 1850, to work the same, which partnership was carried on at a profit without dissolution, although several changes by death and succession had occurred, until 1872, when one of the partners died, and her devisees, after demand made, brought this action for an account. The profits of the concern had been largely invested in buying other quarry lands. The petition alleged that by reason of the deaths of members of the partnership and the confusion of interest they could not say whether

PARTNERSHIP. *Continued.*

the partnership had been dissolved, but that they believed and therefore averred that it was dissolved.

Held, 1. That the partnership was to be considered as subsisting by the consent of the successors in interest of the members deceased, and as still subsisting.

2. That the averment above recited was not an averment that the partnership had been dissolved by a withdrawal of the assent under which it had been continued; and that the facts did not amount to a showing of a dissolution.

3. That a demand for an accounting and payment did not constitute a demand for dissolution.

4. That petitioners were not entitled to demand their shares in cash. They had assented to let the business proceed, and must stand to an accounting, including the losses.

5. That they were not in position to take a decree until a supplemental bill should show a distinct election to dissolve with notice thereof, and refusal to account upon such notice. *Duffield* v. *Brainerd*, 526

105. *Purchaser becomes partner.*—A stranger who purchases the interest of a partner and part owner in a mining claim, thereby succeeds to all the rights of his grantor and thereby becomes a partner with the other owners. *Nisbet* v. *Nash*, 531

106. *No partition or accounting without dissolution.*—A partner can not have partition and accounting without a dissolution of partnership; and a dissolution being found and decreed, the decree should provide for an accounting. *Id.*

107. *Conveyance by partner.*—A member of "a mining partnership" may, without dissolving it, convey his interest in the mine and business. *Kahn* v. *Central Co.*, 540

108. *Insufficient finding as to partnership.*—In a suit to compel an account for the proceeds of a mining claim, a finding by the court that there was no such co-tenancy between the parties in the mine in controversy as to entitle the plaintiff to an accounting, is a mere legal inference, and not a sufficient finding of fact upon which to base a decree. *Id.*

109. *Delectus personæ.*—A different rule from that which governs the relations of members of a trading partnership to each other is recognized as applicable to the relations to each other of members of a mining association. *Id.*

110. *Agreement to purchase on joint account.*—If two or more persons agree among themselves to purchase property for their joint account, and the purchase is accordingly made by one or more of them on behalf of all, the liability of each to pay his share of the purchase money, and his right to an interest in the property can not be controverted. So, also, if two or more persons enter into a contract with another to purchase property, all matters being fully arranged in the agreement, the equal right of all vendees to proceed in the execution of the contract may be conceded. But neither one of the vendees under such contract could take the title to himself, until default by the party excluded, in some manner to which he was bound by the terms of agreement. *First Nat. Bank* v. *Bissell*, 546

PARTNERSHIP. *Continued.*

111. *Fidelity to partnership.*—Fidelity to the partnership is the highest duty of its members; no member can be allowed to turn the partnership concerns to his own account, and one who attempts to do so will be properly called to account by the courts; but it must be made to appear that the malversation is of partnership effects. *Id.*

112. *No right of pre-emption between mining partners.*—In mining partnerships the firm has no right of pre-emption as to the interests of retiring partners, especially where the parties are tenants in common of the mines themselves, and not merely partners in the business of mining. In such an association it can not be said that there is, in the collective body, a right to acquire new interests which its members are bound to respect. Each member holds his interest in his own right, with power to dispose of it as he thinks proper, and is free to deal with an associate, or with a stranger in respect to such interest. And each member is at liberty to buy from his associates, and thus enlarge his interest in the whole property, without reference to the partnership relation, and such purchase will not inure to the benefit of other joint owners. *Id.*

113. *Holding out as partner after notice of dissolution.*—If a retiring partner, after notice of dissolution published, continues to hold himself out to the world as a partner, he must, before he can avail himself of such publication, prove that knowledge thereof came to the party asserting his liability. *Hixon* v. *Pixley*, 555

114. *Idem—Old and new customers.*—If one partner, after the dissolution of the copartnership, consents that his name shall be held out to the world as a partner, all persons, whether new customers or not, will be presumed to deal with the firm upon this partner's credit as well as upon the credit of the other partner. *Id.*

115. *Belief of plaintiff that retiring member was still a partner.*—If plaintiff was aware of the previous copartnership, and had no knowledge of the dissolution, and was misled by the acts of the retiring partner, and induced to deal with the firm upon the belief that the retiring partner was still a member of the firm, it would not be incumbent upon her to show "that she would not have so dealt but for that belief." *Id.*

116. *Lapse of time as affecting knowledge of dissolution.*—The defendant asked the court to instruct the jury, that in determining whether plaintiff was ignorant of the dissolution, they should take into consideration, among other things, "the lapse of time occurring after the alleged dissolution, and prior to plaintiff's dealings with McConnell & Co." The court struck out these words. *Held*, upon a review of the entire instruction that the jury were not misled to the prejudice of the defendant. (Beatty, C. J., dissenting.) *Id.*

117. *Status of partnership lands in equity.*—Lands that are part of a common partnership stock have in equity the character of personalty; and the legal title thereto is subordinated to the incidents of partnership funds and accounting. *Godfrey* v. *White*, 562

118. *Lands as assets.*—Partnership lands can not, in Michigan, be distinguished from other assets for purposes of settlement. *Id.*

119. *Jurisdiction not affected by locus rei sitæ.*—Proceedings between partners for an accounting, are always for the principal purpose of reach-

PARTNERSHIP. *Continued.*

ing a statement of money balances and a division of assets as personalty, and being essentially a personal and not a real controversy, may be carried on in courts within whose jurisdiction the parties live and do business, irrespective of the *locus* of the partnership lands. *Id.*

120. *Claim for personal services by partner.*—Partners can not ordinarily claim allowances for services exceeding those of their associates; but where those who do not expect to be personally charged with the business of the firm perform special services, it is proper to allow them compensation beyond their share of the profits, if they had an understanding with the others that they were to be compensated for them. *Id.*

121. *Negligence of copartner.*—Failure in duty as a partner may be a ground for dissolving the partnership, but not for a claim by diligent partners for compensation. *Id.*

122. *Compensation inter se not implied.*—An agreement to compensate can not be implied from the mere fact that services were rendered. *Id.*

123. *Interest.*—Interest can not be allowed at ten per cent. on an accounting, if there has been no written agreement for that rate. Advances by partners for the benefit of the business do not draw interest unless an intent that they shall do so can be inferred from usage or from circumstances, or unless it is understood by the partners that it shall be allowed. *Id.*

124. *Interest in profits as means of compensation.*—Interest in profits does not necessarily make a person a partner or liable as a partner. If interested in the profits of a mine only as a means of compensation, he is not a partner. In such case his interest is not a property in the profits as such, but a claim against them as a fund out of which, when ascertained, he is to be compensated. *Le Fevre* v. *Castagnio*, 579

125. *Arrangement between quarry and marble mill—Test of partnership—Book account for indorsements.*—The defendant company was the owner of an undeveloped marble quarry, and plaintiffs were its principal stockholders. The company contracted to quarry, deliver on the cars and pay one half the cost of removing the marble to plaintiffs' mill; the plaintiffs were to manufacture it and divide the avails equally. The company credit becoming poor, the plaintiffs had to indorse its paper in order to enable it to keep up the supply of marble. *Held*, that there was no partnership, as there was no community of profit and loss. By the arrangement one might gain and the other lose. 2. That in an action on book account, the mill men could recover the moneys actually paid under their indorsements; but not for indorsements outstanding. *Flint* v. *Eureka Co.*, 588

126. *Agreement amounting to partnership.*—A contract between three persons to operate a "mining property as a company," creates a partnership of such persons from the date thereof, and makes each of them liable for the debts contracted in the prosecution of the enterprise; and this, notwithstanding the fact that such contract also provides that there shall be no division of profits between the parties, until two of them are reimbursed therefrom the money expended in the purchase of their share of the property, and the cost of improving the same. *Bybee* v. *Hawkett*, 594

PARTNERSHIP. *Continued.*

127. *A personal arrangement, whereby one of the partners shares his interest* with a stranger, does not make such stranger a member of the firm. No one can become a member without the knowledge and consent of all. *Id.*

See ADMISSIONS, 3; ASSIGNMENT, 2; BILLS AND NOTES, 2; FORFEITURE, 1; JOINT STOCK CO.; LACHES, 1; LEASE, 4; LIEN, 1, 2, 4; OPTION, 1, 2; PARTIES, 4, 9; PARTITION, 1, 11; PROS. CONTRACT.

PATENT.

1. *Method of determining who is entitled to patent.*—In the bill it was prayed that the complainant be decreed to be entitled to the mining ground in controversy, and that the defendant holds the legal title by patent from the United States in trust for complainant. *Held*, in order to ascertain which party was entitled to a patent, it is only necessary to determine which party at the time of its issue was the rightful owner of the mining claim in question, as against everybody but the United States, under the laws, rules, customs and decisions of the courts in force at the time in the locality embracing it. *420 M. Co.* v. *Bullion Co.*, 608

2. *Application for patent—A proceeding in rem.*—Proceedings to procure a United States patent should be regarded as a proceeding *in rem* conclusive upon all the world. *Id.*

3. *Idem—Res adjudicata.*—The doctrine of *res adjudicata* should be rigorously applied to the litigation brought to test the right to the issue of a patent. *Id.*

4. *Possessory claim can not defeat patented title.*—Title resting upon mining rules and regulations can not avail against a title held by patent from the United States, confirming a Mexican grant, which patent carries with it the ownership of the minerals which the premises contain. *Fremont* v. *Seals*, 632

5. *Locator not compelled to patent.*—There is nothing in the Mining Act imposing an obligation on the locator of a claim to proceed and enforce a patent. *Gold Hill Co.* v. *Ish*, 635

6. *Facts of the case—Agricultural patent void as against pre-existing mining claim.*—The appellant held a lode mining claim located in 1865. In 1870 respondent procured an entry of the quarter section on which the farm was situated, upon which entry an agricultural patent issued to him in the same year. The application was unknown to the lode claimant who was at the time in possession working the claim. *Held*, that the patent was void as to such mining claim and passed no title thereto; second, that as the patent was void as to such claim its holder could not be declared a trustee for the rightful occupant. *Id.*

7. *"Known mineral deposits"—Notice of possession.*—Open and notorious possession (by mining) is sufficient to charge an applicant for patent with notice of the mineral character of land and to bring such land within the description of "known mineral deposits." *Id.*

8. *Recitals of fact and conclusions of law in patent.*—The officers of the government and the grantee, as well as those in privity with him, are bound by the recital of facts contained in the patent of the United States; but an opinion of the executive officers in respect to matters of

PATENT. *Continued.*

law, as indicated either by the ultimate act of issuing the patent or by recitals inserted in that instrument, is not conclusive. ***McGarrahan*** v. *New Idria Co.*, 641

9. *Patent based on statute.*—Neither the president nor any other officer of the government has power to dispose of the public domain or cause the issue of a patent without the authority of some statute of the United States. *Id.*

10. *Void patent based upon Mexican grant not confirmed.*—Under the act of Congress of 1851, "To ascertain and settle private land claims in California," a patent can only issue after the final confirmation of a Mexican grant, and a patent issued before such final confirmation is void. *Id.*

11. *Patent after suit brought.*—A patent from the government to the defendant for the premises in dispute, issued after the commencement of the suit, must be pleaded by a supplemental answer. *Kahn* v. *Old Telegraph Co.*, 646

12. *A patent when granted relates back* to the first initial valid step, which is the foundation of the right and in pursuance of which the patent is issued. *Id.*

13. *Idem—Location—Certificate in aid of patent.*—As a location notice in the acquisition of mineral lands is the first step in that direction, the same is proper evidence in connection with the patent to show the claim to which the patent refers. *Id.*

14. *A patent may be attacked at law*, where void on its face or issued without authority, or against authority, or where the government had no title; but where the government had title and it passed by the grant, it can not be attacked at law upon the pretense either of fraud or superior equities. *Id.*

15. *The want of authority which will make a patent void* is a total want of authority to issue the same for the subject of the grant, and not a latent impropriety in exercising the authority by reason of unknown impositions moving to its exercise. *Id.*

16. *Scope of a mining patent.*—A patent to a mining claim passes whatever title the government had to the surface, and any vein or veins beneath it not otherwise granted; and its issuance presumes a compliance with the mining laws. *Id.*

17. *Public records as evidence.*—The record in the general land office of a patent from the United States is evidence of a grant, but is not the grant itself. If the instrument as recorded is sufficient on its face to pass the title, it is to be presumed that the grant has actually been made; but if it is not sufficient, no such presumption arises. The public records of the executive departments of the government are not like those kept pursuant to ordinary registration laws, intended for notice, but for preservation of the evidence of the transactions of the department. *McGarrahan* v. *New Idria M. Co.*, 665

18. *Record of patent not countersigned, not evidence.*—A patent from the United States for lands must be signed in the name of the president, either by himself or by his duly appointed secretary, sealed with the seal of the general land office, and countersigned by the recorder. Until all

PATENT. *Continued.*

these things are done, the United States has not executed a patent for a grant of lands. A record which fails to show that the patent was countersigned by the recorder is not sufficient to prove a grant from the United States. *Id.*

19. *Exemplifications of records as evidence.*—The countersigning of the patent is not dispensed with by the act of March, 1843, which provides for exemplifications of records to be used as evidence. Under this act the names need not be fully inserted in the record; if they are partially inserted in the record it will be presumed that they fully appear in the patent; but no such presumption will be raised if no signature is shown by the record. *Id.*

20. *Failure to record does not defeat patent.*—The failure to record a patent does not defeat the grant. If the patentee can produce the patent itself, and that is executed with all the formalities required by the law, he can still maintain his rights under it. *Id.*

21. *Patent not to be attacked in court of law.*—A patent from the United States for land is conclusive in a court of law as to all matters properly determinable by the land department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. If, however, it has no such jurisdiction, the patent may be collaterally impeached, and its operation as a conveyance defeated upon that ground. *St. Louis Smelting Co.* v. *Kemp*, 673

22. *Remedy in equity for wrongful issuance.*—If in issuing a patent the officers of the land department take mistaken views of the law, or draw erroneous conclusions from the evidence, or act from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even then must possess such equities as will control the legal title in the patentee's hands. *Id.*

23. *A stranger to the title can not complain* of the action of the government with respect to such title. *Id.*

24. *Placer patent for over 160 acres upheld—Impeachment by showing irregularities in land office not allowed.*—The St. L. Co. brought ejectment against K., and claimed title by virtue of a placer patent from the United States, of date March 29, 1879, and embracing 164.60 acres. The defendant had judgment and upon review it was *held*, that there was error: 1. In admitting the record of the proceedings of the land office to impeach the validity of the patent. 2. In instructing the jury that a patent for a placer claim, since the act of 1870, could not embrace in any case more than 160 acres. 3. In instructing the jury that the owner, by purchase of several claims, must take separate proceedings upon each one in order to obtain a valid patent, and that it was not lawful for him to prosecute a single application upon a consolidation of several claims into one, or for the land officers to allow such application and to issue a patent thereon. *Id.*

PERSONAL LIABILITY.

1. *Directors' contract securing purchase money.*—By a deed which recited that defendants, the directors of a mine company, had purchased

PERSONAL LIABILITY. *Continued.*

a mine for £4,500, to be paid within a twelvemonth out of the moneys to be raised by the company, with a proviso that the directors should be allowed six months further time, in case the bankers of the company should not within the twelvemonth have received sufficient deposits from the subscribers to enable the directors to pay thereout; the directors covenanted that out of the payments so to be made by the subscribers, they would pay the purchase money, at time specified, subject to the aforesaid proviso: *Held*, that the directors were personally responsible at the expiration of the eighteen months. *Hancock* v. *Hodgson*, 698

PLACER.

1. *Placer may exceed 160 acres and cover several locations.*—A patent issued subsequently to the passage of said act of 1870, may embrace a placer mining claim of more than 160 acres, and including as many adjoining locations as the patentee had purchased. The proceedings to obtain a patent, therefore, are the same as when the claim covers but one location. *St. Louis Smelting Co.* v. *King*, 673

See PATENT, 24.

PLEADING AND PRACTICE.

1. *Consolidation of causes in Supreme Court.*—If the plaintiff and defendant each appeal from different portions of the same judgment, and the parties do not stipulate that either transcript may be added to the other, each appeal must be heard on its own transcript. *Fair* v. *Stevenot*, 11

2. *Title admitted by demurrer—Injunction.*—When the defendants by demurring to the complaint have admitted the right of the plaintiff to the use of the water in controversy, the plaintiff may have an injunction against its diversion without first establishing his title by an action at law. *Tuolumne W. Co.* v. *Chapman*, 35

3. *Cross-bill—Distinct equity.*—Where the defendant has a distinct equity, he must set it up by a cross-bill or by an original bill; he can not have the benefit of it by an answer. *Weisman* v. *Smith*, 152

4. *Pleadings and evidence in justice's court.*—The same nicety and precision is not required in pleadings joined in a justice's court which are required in courts of record; and evidence will be received under pleadings joined in the former which could not be received under pleadings joined in the latter. *Musier* v. *Trumphour*, 260

5. *Irregularities in judical proceedings.*—Irregularities and defects of form in judicial proceedings can be taken advantage of by parties or privies only; third persons have no right to interfere. *Breading* v. *Boggs*, 296

6. *Instructions correct in principle but not pertinent.*—Where propositions embodied in points propounded to the court are true as general principles, they should not be negatived without qualification; but if deemed inapplicable to the circumstances of the case, the court should refuse on that ground to charge as requested. *McKnight* v. *Ratcliff*, 364

7. *Defective complaint—Amendment.*—Upon complaint seeking an accounting between ditch owners, proceeding partly upon the theory of a

PLEADING AND PRACTICE. *Continued.*

partnership between the parties, and partly upon the theory of a co-tenancy, but failing to state facts sufficient to constitute either a partnership, or sufficient to make a case for partition: *Held,* that the plaintiffs were not entitled to any of the relief demanded in the prayer, but would be allowed to amend on payment of costs. *Bradley* v. *Harkness,* 389

8. *Certainty, in action of debt.*—Debt lies on any contract in which the certainty of the sum or duty appears. *Kirk* v. *Hartman,* 451

9. *Irregular proceedings in equity, when disregarded.*—In proceedings in equity, for account, etc., there was an answer denying the allegations of the bill, but no replication; the court, without finding a partnership or decreeing an account, referred the case to a master, who heard testimony, found facts and reported an account. *Held,* to be irregular, but no exception being taken in the court below, the Supreme Court would disregard the irregularity. *Hedge's App.,* 462

10. *Service of statement to support new trial, unnecessary.*—The fact that a statement in support of a motion for new trial has not been served upon the opposite party is not a ground for denying the motion. No such service is required either by statute or rule of court. *Brundage* v. *Adams,* 470

11. *Notice of motion for new trial waived.*—A failure to give notice of intention to move for a new trial, although the motion has been duly filed, will not warrant the denial of the motion if the successful party failed to reserve his right to make this objection at the time he proposed amendments to the statement. *Id.*

12. *Necessity of exceptions to report of master.*—As a general rule the report of a master, or a commissioner acting as master, is received as true when no exception is taken, and parties who are dissatisfied with such a report should except to it, or take some other action appropriate to the objection. *Butterfield* v. *Beardsley,* 495

13. *Findings of court on legal issue.*—When there is no issue properly cognizable in equity, findings on the facts by the court below must be treated the same as if the same facts had been found by a jury. *Judge* v. *Braswell,* 508

14. *Findings before judgment.*—Where, under the practice established in Utah, issues are tried by the court, its findings of fact should be announced and filed before the entry of the judgment. *Kahn* v. *Central Smelting Co.,* 540

15. *Unauthorized entry of new finding.*—After such entry an additional finding, made at the request of either party without notice to the other, forms no part of the record. *Id.*

16. *Finding vacated without reversing judgment.*—One of several findings may be set aside without reversing the judgment if the remaining findings are sufficient to support the judgment, and the finding so vacated would be thus taken out of the operation of the rule relating to *res adjudicata. 420 M. Co.* v. *Bullion M. Co.,* 608

17. *Admissions in answer which negative denials.*—In case the admissions of an answer contradict its general denials the latter may be disregarded. *Fremont* v. *Seals,* 632

PLEADING AND PRACTICE. *Continued.*

18. *Statutory denials of answer.*—Where the statute provides that the allegations of the answer shall be deemed to be denied, this does not take the place of a bill in equity on which to grant affirmative relief. *Kahn* v. *Old Telegraph Co.*, 647

See APPEAL, 1; EJECTMENT; INJUNCTION; LEASE, 4; MASTER AND SERVANT, 2; PARTIES, 6; PATENT, 11; TROVER.

POLLUTION OF STREAMS.—See NUISANCE, 3.

POSSESSION.

1. *Possession of land shown by use.*—Where a party claiming a small strip of land on the bank of a creek, constructed and maintained a bridge over the creek abutting on the premises, it was *held*, that this use of the land was sufficient evidence of possession to maintain ejectment. *Quicksilver Co.* v. *Hicks*, 98

See CONVEYANCE, 2; NOTICE, 1-3; OCCUPATION, 1; PUBLIC DOMAIN, 3.

POWDER MAGAZINE.—See NUISANCE, 21, 22.

PROSPECTING CONTRACT.

1. *Prospecting arrangement between claimant and adventurer.*—An agreement between one or more persons who claim an undeveloped mine, and another person, that if the latter will give his labor to develop the mine the former will furnish him with tools and provisions, and give him a share in the mine if it proves valuable, followed by a joint working of the mine and sharing the profits by the parties, constitutes one of those qualified partnerships common in California, known as mining partnerships. *Settembre* v. *Putnam*, 425

2. *Idem—Adventurer entitled to conveyance.*—Such a contract resulting in success entitles the adventurer to his proper share in the property. *Id.*

3. *Oral agreement for locating lodes—Statute of Frauds.*—If three persons enter into an oral agreement of copartnership in the business of prospecting and discovering quartz claims, and of acquiring title thereto for the mutual benefit of the copartners, such contract is not within the Statute of Frauds. *Hirbour* v. *Reeding*, 514

See PARTNERSHIP, 25; TRUST, 3.

PUBLIC DOMAIN.

1. *The miner's right a pre-emption.*—The right given by the mining acts of Congress, is a right to purchase in the nature of a pre-emption, and is in no wise like an inchoate, imperfect, Spanish grant. *420 M. Co.* v. *Bullion Co.*, 608

2. *Idem—Not a bounty.*—The right of purchase under the United States mining acts is not a bounty. *Id.*

3. *Miners not actual settlers.*—The eleventh section of the act "for the protection of actual settlers," etc., can not be invoked by miners engaged simply in extracting gold from a quartz vein. *Fremont* v. *Seals*, 632

4. *By the Mining Act of 1866* the general government extended to all

PUBLIC DOMAIN. *Continued.*
in possession of mining claims, and to all subsequently locating and denouncing mines containing the precious metals, a guaranty of protection in their occupancy so long as the mines are operated and worked. *Gold Hill Co.* v. *Ish*, 635
See MINERALS, 2.

QUIET TITLE—See STATUTE OF LIMITATIONS, 2.

RECEIVER.
1. *Manager.*—The power of the court to appoint a manager of works and mines as a trading concern, pending final decree, stated. *Crawshay* v. *Maule*, 223
See PARTNERSHIP, 26.

RECORD—See PATENT, 17-20; VENDOR AND PURCHASER, 1.

RENT—See LEASE, 3.

RES ADJUDICATA.
1. *Former judgment for same cause, a bar.*—A judgment in a former action is well pleaded in bar of a suit for the same cause of action although the form of action has been changed. *Taylor* v. *Castle*, 484
2. *Idem—Test of what is res adjudicata.*—The cause of action is said to be the same where the same evidence would support either action. *Id.*
3. *Judgment on issues in bar and in abatement.*—In 1872 the 420 Mining Company brought suit against the Bullion Mining Company to determine the right of the latter company to 420 feet of the Comstock lode. Under the statute of Nevada, allowing matters going only to defeat the present action as well as defenses on the merits, to be pleaded together, defenses of the two sorts were accordingly pleaded. The issues upon both were found for defendant, and the judgment was entered in a form appropriate as an adjudication upon the finding upon the merits. *Held*, that the title was *res adjudicata* and the parties were estopped from further litigating the merits. *420 M. Co.* v. *Bullion Co.*, 608
See ESTOPPEL, 4; PATENT, 3.

RIPARIAN RIGHTS.
1. *Right to use of water.*—A proprietor of land over which a stream of water runs, has, as against a lower proprietor, the use of only so much of the stream as will not materially diminish its quantity or corrupt its quality. His right is not to be measured by the reasonable demands of his business. *Wheatley* v. *Chrisman*, 24

SET-OFF—See MORTGAGE, 2.

SHARE—SHAREHOLDER.
1. *Attempted restriction upon transfer of shares.*—A company's deed provided that the company should not be affected by notice of any trust, and that where any share should become vested in any person, for any interest not absolute, the receipt of the shareholder should remain a sufficient discharge. *Held*, that the equitable mortgagee of shares had a right to sue the company. *Binney* v. *Ince Hall Co.*, 410

SHARE—SHAREHOLDER. *Continued.*

2. *Articles of association not signed by shareholder.*—Under articles of association providing that the ownership of a certificate should carry with it an undivided interest in all company property, the fact that a subsequent purchaser of a certificate had never subscribed the articles, is of no consequence as affecting his right to a ratable share of the proceeds of a sale of the company's property. *Butterfield* v. *Beardsley*, 495

See PARTNERSHIP, 7, 82.

STATUTE OF FRAUDS.—See PROSPECTING CONTRACT, 2, 3.

STATUTE OF LIMITATIONS.

1. *Statute of Limitations in favor of deceased partner.*—After the death of one of the members of a copartnership, the Statute of Limitations begins to run in favor of his personal representatives against a claim to have an account of profits received by him. *Weisman* v. *Smith*, 152

2. *Affirmative aid to limitation title.*—A title acquired under the Statute of Limitations, may be quieted in the adverse holder upon a bill in equity, filed for that purpose, even against the holder of the paper title barred. *420 M. Co.* v. *Bullion Co.*, 609

3. *Admissions in plea of limitation.*—The defendants, in an action of ejectment, pleaded occupation and possession by themselves for more than five years last past and for more than "two years from the date of the issuance of the patent" to plaintiff. *Held*, that this was an admission that plaintiff was seized of the premises within five years. *Fremont* v. *Seals*, 633

See ADVERSE CLAIM, 1; ADVERSE POSSESSION, 1; PARTNERSHIP, 30.

STOCK.

1. *Title to stolen stock* can not be divested out of the real owner by sale at auction and purchase by innocent buyer. *Skillman* v. *Lachman*, 381

See CORPORATION, 1; NOTICE, 4; PARTNERSHIP, 82.

SURVEY—See BOUNDARIES, 2; MINERAL LANDS, 1.

TENANT IN COMMON.

1. *Co-tenants may purchase of each other.*—Co-tenants are not at liberty to assail the common title, but they may purchase of each other, the same as a stranger might purchase from any or all of them. The purchase by one co-tenant of the interest of another will not inure to the benefit of all who retain an interest in the property. *First Nat. Bank* v. *Bissell*, 546

2. *Ouster of tenant in common—Statute of Limitations.*—The taking possession of the whole mining claim by one tenant in common under a conveyance hostile to the title under which the co-tenancy exists, and excluding the co-tenant, is an ouster, from the date of which ouster the Statute of Limitations begins to run in favor of the tenant so taking exclusive possession, and against his co-tenant. *420 M. Co.* v. *Bullion Co.*, 608

TENANT IN COMMON. *Continued.*

3. *No fiduciary relation after ouster.*—Where a tenant in common has ousted his co-tenant, there ceases to be any fiduciary relation between them. *Id.*

See DITCH, 2; LEASE, 2; OIL, 8; PARTIES, 3; PARTNERSHIP, 53.

TENDER.

1. *Tender waived.*—The refusal of the defendants to deliver the oil, excused the plaintiffs from tendering payment. *Forsyth* v. *North Am. Oil Co.*, 115

TIME—See PARTNERSHIP, 116.

TRESPASS—See INJUNCTION, 3; MEASURE OF DAMAGES, 2; PARTNERSHIP, 48.

TROVER.

1. *Verdict upon conflicting evidence not disturbed.*—In an action of trover against P. and McC. as copartners to recover $23,390 for the alleged wrongful conversion of certain shares of mining stock, the plaintiff relied upon two grounds to sustain the action against P. 1st. That he was a partner at the time of the alleged conversion. 2d. That if not a partner in fact, he suffered himself to be held out to the world as such, and thereby became liable to plaintiff. There was a verdict and judgment for plaintiff, and P. appealed upon the ground that the evidence was insufficient to support the verdict. *Held*, that there being a substantial conflict in the evidence upon the first point, the verdict of the jury should not be disturbed; and that the evidence was clearly sufficient to sustain the verdict upon the second point. *Hixon* v. *Pixley*, 555

2. *Allegation of value material.*—The allegation of value in an action of trover is a material averment. If not denied it need not be proven.

3. *Time of conversion immaterial.*—The allegation as to the time of conversion, in an action of trover, is immaterial. *Id.*

See CONVERSION, 1.

TRUST.

1. *Sale by trustee to innocent purchaser.*—If one of several partners in a mine holds the legal title in the same in his own right to the extent of his interest, and in trust for his copartners to the extent of their interests, a sale made by him, without the consent of his associates, of an undivided interest not exceeding in amount the interest held in his own right to one who had no notice of the trust, will convey only the title of the grantor, and not the interests of the *cestuis que trust*. *Settembre* v. *Putnam*, 425

2. *Purchase as trustee—Right to follow the fund.*—If one take unto himself a title which he has purchased with the money of another, he is a trustee for the true owner, who may rightfully follow the fund, wherever it may be miscarried. *First Nat. Bank* v. *Bissell*, 547

3. *Prospector holding title in his own name for associates.*—If the legal title to a lode discovered and located in pursuance of a prospecting contract is taken in the name of two of the partners, equity will treat them as trustees for the other partner. *Hirbour* v. *Reeding*, 514

See AGENT, 2; JUDGMENT, 1; PARTNERSHIP, 68; PROSPECTING CONTRACT, 233; TENANT IN COMMON, 3.

VENDOR AND PURCHASER.

1. *Prior deed not conclusive of title.*—A deed which has been recorded is not conclusive evidence of title in the grantee, as against a grantee in a prior unrecorded deed who is in possession. *Fair* v. *Stevenot*, 11

2. *Agreement to purchase gives no right of property.*—An agreement between two parties to purchase the property of a third could give no right to either until consummated in the purchase of the property. *First Nat. Bank* v. *Bissell*, 546

See ESTOPPEL, 5; NOTICE, 1-3.

VENUE—See ACCOUNT, 1.

WAGES—See PARTNERSHIP, 120, 122.

WAIVER.

1. *Waiver of part of relief asked for in equity.*—If, in an action brought against two of several mining partners to establish the plaintiff's right to an interest under a contract with the defendants, and for a conveyance with account and dissolution, the plaintiff is content with a judgment establishing his right and directing a conveyance, waiving account and dissolution, the court may grant that relief and give judgment, without making the other partners parties defendant. *Settembre* v. *Putnam*, 425

2. *Balancing of interests.*—Where the interest of a witness is equally balanced between the parties, he is competent and may testify. *Blewett* v. *Coleman*, 160

See PARTITION, 2, 3.

WATER—See INJUNCTION, 1; PARTITION, 12; RIPARIAN RIGHTS.

WEIGHTS AND MEASURES—See OIL, 3.

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